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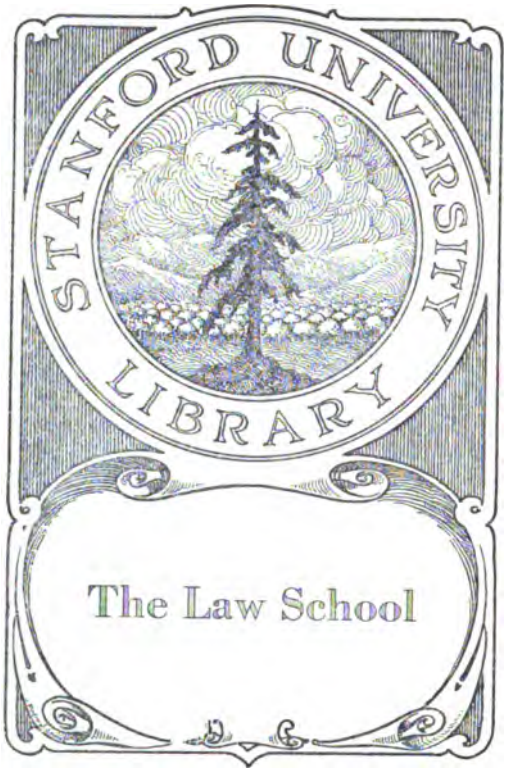
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THE LAW

OF

WORKMEN'S COMPENSATION

Rules of Procedure, Tables, Forms, Synopses of Acts.

BY

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Missouri Workmen's Compensation Act, of 1919.

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WORKMEN'S COMPENSATION LAW

VOLUME II

CHAPTER VIII.

DISABILITY BENEFITS AND COMPENSATION BENEFITS.

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§ 398. **General.**—Disability or incapacity for work must be found to exist in order to justify a disability benefit award.[19] Awards may be made for medical or hospital expense alone, where the employer has failed to provide such service, and the disability, if any, does not exceed the waiting period. Several acts[20] now provide compensation for an injury producing a serious permanent disfigurement of the face or head, or a serious and permanent impairment of the usefulness of any member, or physical function, without regard for disability to work.[21]

The word "compensation," in the connection in which it is used in the acts, means the money relief or disability benefits afforded according to the scale established and for the persons designated by the act, and not the compensatory damages recovered in an action at law for a wrong done or contract broken.[22] Disability benefit is the more accurate term to use in this connection. Which is the giving of compensation limited in amount but commensurate, in some degree, with the disability suffered.[23]

What constitutes disability, temporary or permanent, is usually defined in the acts. Many of the Acts have in addition definite schedules of injuries for which compensation is allowed for a stated period or number of weeks. To attempt a comparison of these provisions of the various acts would be impracticable, excepting

19. Marhoffer v. Marhoffer (N. Y. App. Div.), 116 N. E. 379, B 1 W. C. L. J. 1200; Johnstad v. Lake Superior Terminal & Transfer Co., — Wis. —, 162 N. W. 659, B 1 W. C. L. J. 1676.

20. California, Colorado, Illinois, Idaho, Louisana, Maryland, Missouri, Nevada, New Mexico, New York, North Dakota, Oklahoma, South Dakota, Utah, Vermont, Wisconsin.

21. Mack v. Legeai, 144 La. 1017, 81 So. 694, 4 W. C. L. J. 202; Hercules Powder Co. v. Morris County Ct. of Common Pleas, — N. J. —, 107 Atl. 443, 4 W. C. L. J. 523.

22. Duart v. Simmons, 231 Mass. 313, 121 N. E. 10, 3 W. C. L. J. 136.

23. Klippert v. Indus. Ins. Dept., — Wash. —, (1921), 196 Pac. 17.

a few of the more general provisions. The decisions of the courts to the extent set out in the following pages will be a greater help in determining the construction placed upon these provisions of each particular state act, in so far as the construction may have been determined by judicial decisions.

§ 399. **Waiting Period.**—All of the American acts at this time prescribe a period of time immediately following the injury during which no compensation is required to be paid. This is known as the waiting period, and varies in the different acts from three days to three weeks. The usual period is seven or ten days. The waiting period has no application to the requirement to provide medical attention to which the employee becomes entitled immediately upon injury. The acts of a growing number of states provide compensation for the waiting period if the disability continues for a certain number of weeks.

Other states provide that the waiting period shall not apply in cases of permanent or total disability, or, if it does apply, it is reduced to one week. The purpose of the waiting period is to prevent workmen, who are so inclined, from taking advantage of a slight or imaginary strain, as an excuse for obtaining a few days vacation on half or two-thirds pay. It was because of such experience that the state of Washington amended its law increasing the waiting period from one and one-half days to seven days. To eliminate the waiting period would increase the cost of administration and insurance enormously, would be socially disadvantageous by multiplying lost time, and yet would reduce the real hardships of the working people from accidents very little.

Where the employer and employee have elected to come under the act, its provisions being in lieu of all other remedies, there can be no other claim made for injuries which disable the workman for a period of time within the waiting period, unless the act specifically provides for such a claim.

§ 400. **Classes of Disability, and What Constitutes.**—There are four designated classes of disability for which compensation is payable.[24] They are permanent total, permanent partial temporary total and temporary partial.

24. Wagner v. American Bridge Co, 172 App. Div. 876, 158 N. Y. Supp. 1043.

Each class is separately treated in subsequent sections.

Disability or incapacity for work in the sense in which it is used in the compensation Acts means inability to earn wages or full wages, as the case may be, at the work in which the injured workman was employed at the time of the accident,[25] or inability to perform such work as may be obtainable, or inability to reach his place of work on account of his injuries,[26] or inability to secure work to do.[27]

In a Wisconsin case the appellant contended that unless the earning capacity of the claimant in the employment in which he was engaged at the time he was injured has been impaired, there can be no recovery for permanent disability. The court said: "The correctness of appellant's first contention cannot be gainsaid. The statute (St. 1911, Sec. 2394-10) provides that the loss in wages for which compensation may be made shall consist of such percentage of the average weekly earnings of the injured employee as shall fairly represent 'the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident.' This court has held that this statute was plain and meant just what it said, and recovery was allowed for total disability because the employee was unfitted by his injury to follow the occupation in which he was engaged when injured, although it was shown without dispute that he was capable of earning substantial wages in other occupations. Mellen Lumber Co. v. Industrial Com., 154 Wis. 114, 3 N. C. C. A. 649, 142 N. W. 187."[28]

25. Duprey v. Maryland Casualty Co., 219 Mass. 189, 106 N. E. 686; Gillens Case, 215 Mass. 96, 102 N. E. 346, L. R. A. 1916A, 371; Moses v. National Union Coal Mining Co.—Ia.—184 N. W. 746; In re Lester O. Pullman, 3rd A. R. U. S. C. C. 148.

26. Beddard v. Stanton Iron Works Co., Ltd., 6 B. W. C. C. 627 C. A.

27. Gorrell v. Batelle, 93 Kan. 370, 144 Pac. 244; In re Sullivan, 218 Mass. 141, 105 N. E. 463, 5 N. C. C. A. 735.

28. International Harvester Co. v. Indus. Com., 157 Wis. 167, 147 N. W. 53, Ann. Cas. 1916B, 330, 5 N. C. C. A. 822; Woodcock v. Dodge Bros., — Mich. —, (1921), 181 N. W. 176; Foley v. Ry., 190 Mich. 507, 157 N. W. 45; Jamerson v. Newhall, 200 Mich. 514, 166 N. W. 834; Miller v. Fair and Sons, 206 Mich. 360, 171 N. W. 380; Margenovitch v. Newport Mining Co., — Mich. —, (1921), 181 N. W. 994.

Under the Wisconsin Workmen's Compensation Act, as it existed in 1913, where injuries did not impair the earning capacity of an employee, no compensation could be awarded.[29]

Where the employee claimed compensation under the Nebraska Act, in a case in which the employee's large toe was amputated, the court said: "The statute conclusively presumes that for the loss of, or the permanent loss of the use of, a hand, arm, foot, leg, or eye, the proper compensation is 50 per cent. of the wages for a specified number of weeks respectively. For any other partial disability compensation is to be determined by proof of impairment of earning power. If an employee after his injury receives the same or higher wages than before ordinarily that would indicate that his earning power had not been impaired. Such evidence, however, would not necessarily be conclusive, since after the injury he might for various reasons receive higher wages, though his earning power had been impaired by the injury. A general advance in wages might enable the injured employee to secure the same wages after as before the injury, though partially disabled. In the present case it is a reasonable inference from the evidence that plaintiff received higher wages because he had by education and training fitted himself for more remunerative employment. There is evidence tending to show that he is unable to perform the duties of his former employment. The evidence justifies a finding that his earning capacity has been impaired."[30]

Where an employee, during the period of partial disability, earned more than he had been earning prior to the injury, the court in denying compensation for partial disability under a statute allowing compensation on the basis of the difference in wages before and after the injury, said that there were no grounds for allowing additional compensation where the amount actually earned subsequent to the injuries was equal to or greater than wages earned prior to the injury.[31]

29. Johnstad v. Lake Superior Terminal etc. R. Co., 165 Wis. 499, 162 N. W. 659.

30. Epsten v. Hancock-Epsten Co., 101 Neb. 442, 163 N. W. 767, 15 N. C. C. A. 1067.

31. In re Dove, 64 Ind. App. —, 117 N. E. 210, 15 N. C. C. A. 1067.

§ 401. **Disfigurement, Compensation Without Disability, Damages.**—Under the New York Act, compensation is allowable for serious facial and head disfigurement, even though such disfigurement does not impair the earning capacity of the employee. The amount of such compensation lies within the discretion of the commission, but can not exceed $3,500.00.[32]

Under the Louisiana Act, prior to the Amendment of 1916, an employee who suffered a serious injury, but one which did not impair his earning power, was not entitled to compensation under the act, but was entitled to maintain an action at law. It was so held where a woman lost her scalp, as the result of an accident, while engaged in her employment.[33]

Disfigurement which does not incapacitate a workman is not compensable, but if it prevents the employee from securing employment or in any manner lessens his wages, it may form the basis of compensation, although not specifically mentioned in the statute. So where a workman's face was burned and scarred by acid, compensation was denied.[34]

"Where a particular injury results in part in a temporary or permanent disability, and in part in the disfigurement of the person of the employee, or other injury not amounting to a disability, the employee is limited in his relief to that given by the Minnesota Act, and an action at law for the injury not amounting to a disability cannot be maintained.

"That the remedy so given and provided is exclusive of all others seems to be the prevailing opinion of the courts where the question has received attention. Shanahan v. Monarch Engineering Co., 219 N. Y. 469, 114 N. E. 795; Gregutis v. Waclark Wire Works, 86 N. J. Law, 610, 92 Atl. 354; Peet v. Mills, 76 Wash. 437, 136 Pac. 685, L. R. A. 1916A, 358, Ann. Cas. 1915D, 154; King v. Viscoloid Co., 219 Mass. 420, 106 N. E. 988, Ann. Cas. 1916D, 1170; Connors v. Semet-Solvay Co., 94 Misc. Rep. 405, 159 N. Y. Supp. 431, in which it was said that Shinnick v. Clover-Farms Co., 169 App. Div. 236, 154 N. Y. Supp. 423,

32. Erickson v Preuss, 223 N. Y. 365, 119 N. E. 555, 16 N. C. C. A. 481.

33. Boyer v. Crescent Paper Box Factory, 143 La. 368, 78 So. 596, 2 W. C. L. J. 71; Weber v. American Silk Spinning Co., 38 R. I. 309, 95 Atl. 603, 11 N. C. C. A. 436.

34. Clooney v. Crescent Glass Specialty Co., 37 N. J. L. J. 82.

holding to the contrary had been overruled by Jensen v. Southern Pacific, supra. If the case was not in effect there overruled, it clearly was so disposed of by the later decision of the Court of Appeals in the Shanahan Case above cited. The case of Boyer v. Crescent Paper Co., 143 La. 368, 78 South, 596, takes the other view of the Louisiana Compensation Act and supports plaintiff in the case at bar. But to follow that rule would in a large measure be destructive of the main purpose and scheme of the statute, and deprive the employer of a right expressly granted him in return for his concession of liability for the nonactionable injury. It would result also in opening wide the door to double litigation in a great majority of the compensation cases. With the opportunity presented the discovery of negligence in some respect contributing to a particular injury would not be difficult and thus the employer exposed to a second suit in which recovery could be had for pain and suffering, disfigurement of person, in addition to a recovery of compensation for actual disability under the Compensation Act.

"A personal injury received at the hands of a wrongdoer constitutes but one right of action. It cannot be divided into several parts to accord with the elements of damages recoverable therefor, it presents a single controversy to be settled in a single action. Dunnell's Dig. 5167. That is elementary, and it is manifest that there was no intention on the part of the Legislature to change or abrogate it by the Compensation Act; and no such intention should be presumed by the court. On the other hand, it is clear that the intention of that body was to present to the employers and employees of the state a comprehensive act embracing their exclusive rights and remedies for accidental or other injuries suffered by the employee. Morris v. Muldoon, 190 App. Div. 689, 180 N. Y. Supp. 319. If the compensation so provided is deemed inadequate, or that the act should be made to include all or any of the common-law elements or ingredients of relief found in the negligence law, the change should come about by legislation and not by rule of court."[35]

35. Hyett v. Northwestern Hospital for Women and Children, — Minn. —, (1920), 180 N W. 552, 7 W. C. L. J. 337.

The Industrial Commission of Illinois has no power to award compensation for disability and also compensation for disfigurement of the same member. But an award for disfigurement of the face and hands does not preclude an award for the loss of the use of the eyes and arms.[36]

§ 402. **Impairment of Physical Efficiency Without Wage Loss.** —Where a workman receives injuries of a permanent nature which are not particularly provided for under the New Jersey Act the court cannot fix a specific number of weeks' disability for each specific injury, without showing that the compensation awarded bears the same relation to the amount stated in the schedule as the disabilities bear to those produced by the injuries named under the schedule.[37]

If the employee's physical efficiency has been substantially impaired, the fact that he is employed at the same work, or at the same or higher wages, will not as a general rule disentitle him to compensation, unless it is expressly so provided in the act under which the claim is made.[38]

Some impairment of efficiency is, however, essential, unless the injury comes within the disfigurement provision of the act.[39]

Under the Kansas Act, the court, in holding that it was immaterial whether an injured employee was making as much or more after the injury in some other line of employment as he was making prior to the injury, said: "It is settled that, when one is totally or partially incapacitated for hard manual labor he is not

36. International Coal and Mining Co. v. Indus. Comm., — Ill. —, (1920), 127 N. E. 703, 6 W. C. L. J. 278; Chicago Home For the Friendless v. Indus. Comm., — Ill. —, (1921), 130 N. E. 756.

37. O'Connel v. Simms Magneto Co., 85 N. J. L. 64, 98 Atl. 922, 4 N. C. C. A. 590.

38. Burbage v. Lee, 87 N. J. L. 36, 93 Atl. 859; De Zeng Standard Co. v. Pressey, 86 N. J. L. 469, 92 Atl. 278; Frankfort General Ins. Co. v. Pillsbury, 173 Cal. 56, 159 Pac. 150; Clark v. Kennebec Journal Co., — Me. —, (1921), 113 Atl. 51; Mercury Aviation Co. v. Indus. Comm., — Cal. —, 199 Pac. 508.

39. Shinnick v. Clover Farms Co.. 169 App. Div. 236, 154 N. Y. Supp. 423.

to be denied compensation because he obtains employment even at better wages at a task which he is physically able to perform."[40]

In another Kansas Case, in which it was contended on appeal that as plaintiff returned to work at his old wages two weeks "If the employment relieved the defendant of liability, then any employer can escape liability for compensation by retaining the injured employee and paying him wages, although he may not be able to do as good work after the injury as he did before. An injured employee may not wish to continue to work for the one in whose employment he was injured, and because of his injury cannot obtain as good wages in another place. The injured employee has a right to compensation for his injury. It does not matter that his employer continues to accept his services and pay him regular wages, unless that employment continues for the entire period for which compensation might be allowed. The act fixes the liability when the employee was injured. That liability can be discharged only in the manner directed by the statute."[41]

Under the Michigan Act, an employee who is unable to earn as much after the injury as before, in the same employment, is entitled to compensation for partial disability, and the fact that he can earn more in another employment is immaterial.[42] It has been held in Illinois that where he makes more after the injury than before there is no basis for compensation.[43]

Under an act which defines "permanent injury" as one where the usefulness of a member is permanently impaired, or where any physical function is permanently impaired, it has been held that an injury resulting in the loss of a testicle is a compensable injury, even though it does not impair the earning efficiency of the employee.[44]

40. Sauvian v. Batelle, 100 Kan. 468, 164 Pa. 1086, 15 N. C. C. A. 1070; Dennis v. Cafferty, 99 Kan. 810, 163 Pac. 461, 15 N. C. C. A. 1068.

41. Gailey v. Peet Bros. Mfg. Co., 98 Kan. 53, 157 Pac. 431, 15 N. C. C. A. 1070.

42. Foley v. Detroit United Ry. Co., 190 Mich. 507, 157 N. W. 45.

43. Voight v. Indus. Comm., — Ill. —, (1920), 130 N. E. 470.

44. Hercules Powder Co. v. Morris County Court of Common Pleas, —

§ 403. **Termination of Disability.**—Temporary employment at a different occupation for a few days at higher wages then the employee received prior to his injury is not conclusive evidence that his disability has ceased.[45]

The fact that an employee, has been committed to jail is no grounds for discontinuing compensation payments.[46]

If the workman is less able to compete in the labor market, or his earning capacity might be less in the future than it was before the accident, as a result of the accident, he is entitled to compensation, regardless. of the fact that at the time of the hearing he may again be doing his customary work at the same or better wages.[47]

Incapacity cannot be presumed from the mere inability to obtain work.[48] Compensation is payable for inability to do work, or to obtain work because of the physical condition of the workman, due to the accident.[49]

Probable future earnings cannot be determined from an offer of work extended by the workman's employer pending litigation.[50] Neither can an award for total incapacity be reduced because the employee has not attempted to obtain employment.[51]

An employee will not be deprived of his right to compensation by reason of his lack of will power to throw off a nervous condition which followed the accident.[52]

The suspension of payments with the approval of the accident board, on the ground that the employee was totally incapacitated

N. J. —, (1919), 107 Atl. 433, 4 W. C. L. J. 523; Chiovitte v. Zenith Furnace Co., — Minn. —, (1921), 181 N. W. 643.

45. Hanley v. Union Stock Yards Co., 100 Neb.. 232, 158 N. W. 939.

46. Hanlon v. Employers' Liab. Assur. Corp., 2 Mass. Ind. Acc. Bd. 716, Bull. No. 11 Minn. Dept. of Labor 40. See Clayton and Shuttleworth v. Dobbs, (1908), 2 B. W. C. C. 488.

47. Birmingham Cabinet Mfg. Co. v. Dudley, 3 B. W. C. C. 169 C. A.

48. Jordan v. Decorative Co., — N. Y. App. —, 130 N. E. 634, (1921),

49. Diaz v. Contractors' Mut. Liab. Insur. Co., 217 Mass. 36, 104 N. E. 384; Dobby v. Wilson Pease & Co., 2 B. W. C. C. 370 C. A.

50. Giachas v. Cable Co., 190 Ill. App. 285.

51. In re Septimo, 219 Mass 430, 107 N. E. 63.

52. In re Hunnewell, 220 Mass. 351, 107 N. E. 934.

for a time, is to be construed as leaving open for further determination the question of partial incapacity.[53]

A receipt reciting that total disability has ceased, does not preclude an injured employee from recovering compensation under the workmen's compensation act for a recurrence of the disability. Nor will the finding of the Industrial Board prevent recovery of this kind. And the employee need not apply for reinstatement within one year, for the compensation period had not terminated nor is the relief granted an original award.[54]

Where an injured employee had been operated upon several times and a lump sum was awarded for another operation but the employee refused to have it performed, the employer should be relieved from further payments where the employee was making more than he had ever made before.[55]

The cessation of disability for which compensation is to be paid under the Louisiana Employer's Liability Act is open to inquiry even after final judgment.[56]

Where an employee received compensation while out of work on account of an injury and had returned to work and was later discharged, and brought an action under the Employer's Liability Act, the court held that there was evidence to the effect that the employee had asked for a certificate permitting him to return to work, upon returning he claimed to be unable to do heavy work and was given a light job as watchman, but for sufficient reasons he was discharged from this job and then applied for a job as carpenter but because of a failure to agree upon wages he did not begin work and applied for reinstatement on the compensation roll and upon refusal filed this suit. This evidence was sufficient to justify a finding that disability had terminated at the time the physician had refused to reinstate him on the pay roll.[57]

53. Frizzi's Case, — Mass. —, (1921), 130 N. E. 95.

54. Ft. Branch Coal Mining Co. v. Farley, — Ind. App. —, (1921), 130 N. E. 132.

55. Smith v. J. Stevenson Co., — Mich. —, (1920), 180 N. W. 384, 7 W. C. L. J. 322.

56. Pye v. Southwestern Gas & Electric Co., — La. —, (1920), 85 So. 232, 6 W. C. L. J. 450.

57. Bianchi v. Bd. of Com'rs of Port of New Orleans, — La. —, (1920), 84 So. 657, 6 W. C. L. J. 317.

Where an employee develops a disease subsequent to an injury, but which was not due to the injury, the disability caused by the disease will not justify a continuation of compensation beyond the period for which the effects of the injury would incapacitate.[58]

"The 'odd lot doctrine' is that, if the effects of an accident have not been removed, it is not sufficient, to entitle an employer to have a reduction in the weekly compensation ordered by the court under the Workmen's Compensation Act, when it appears the workman has the physical capacity to do some kind of work different from the general kind of work which he was engaged in at the time of the accident, but it must also be shown that the workman, either by his own efforts or that of his employer, can actually get such work; that is, the burden is on the employer to show that the workman can get a job."[59]

Disability ceases when an employee is "physically able to work" without endangering his life or health.[60]

Under the Texas Act, the Industrial Accident Board has the power to terminate compensation to an injured employee upon a showing that the injury has healed.[61]

§ 404. **Pain Suffering and Old Age as Affecting Right to Compensation.**—Where pain is of such a character as to prevent a person from pursuing his employment it is a proper element to consider, but the workmen's compensation act does not aim to give compensation for pain and suffering which does not tend to incapacitate.[62]

The admission of evidence as to pain and suffering in a proceeding for compensation, although it would have most likely been

58. In re John H. Wardrop, 2nd A. R. U. S. C. C. 90; In re John C. Collins, 2nd A. R. U. S. C. C. 91.

59. Lupoli v. Atlantic Tubing Co., — R. I. —, (1920), 111 Atl. 766, 7 W. C. L. J. 356.

60. Voight v. Indus. Comm., — Ill. —, (1921), 130 N. E. 470.

61. Employers' Indem. Corp. v. Woods, — Tex. Civ. App. —, (1921), 230 S. W. 461.

62. Trowbridge v. Wilson & Co., 102 Kan. 521, 170 Pac. 816, 18 N. C. C. A. 469; Raffaghelle v. Russell, 103 Kan. 849, 176 Pac. 640, (1918); Perry County Coal Co. v. Indus. Comm., — Ill. —, 128 N. E. 333, 6 W. C. L. J. 653.

excluded if offered before a jury, was not prejudicial where offered to the court.[63]

In proceedings under the Massachusetts Act, the fact that an employee was of failing physical powers, which would probably incapacitate him for work in a very few years, was held to be immaterial, if his incapacity to work was directly due to his injuries. Compensation was allowed.[64]

Where an employee, 68 years of age, was injured by a fall and sustained a fracture of several ribs, compensation was paid up to a certain date, when the payments were stopped on the ground that the applicant's incapacity was due to increasing old age. The California Commission in denying further compensation said: "The Workmen's Compensation, Insurance and Safety Act provides compensation only in those cases where the injury is proximately caused by accident. It is the intent of the act to make the industry chargeable with those consequences of accident which are proximately due to the injury and not those consequences which are remotely due to the injury. It takes longer for fractured bones to heal where the injured person is in advanced years than it does where the injured person is young or in middle life, and the compensation law wisely permits an extension of disability period to cover the time necessary for the healing of the wounds and fractures, no matter how much longer a time is required to effect such healing by reason of the age of the injured person. But such industry cannot properly be charged with those consequences of injury for which the accident is only remotely responsible. That is, in the case of applicant Udell, his lack of recuperative power is proximately due to age and not to accident. His ribs have reunited, his bruises have healed, and he is well as far as medical and surgical science can make him well. What he has lost is resiliency, and his accident was only the occasion and not the cause of this loss. The cause was his advanced years and very high blood pressure, arterio sclerosis, a degenerative myocarditis,

63. Giachas v. Cable Co., 190 Ill. App. 285, 18 N. C. C. A. 469.

64. Duprey v. Maryland Casualty Co., 219 Mass. 189, 11 N. C. C. A. 55, 106 N. E. 686; Jackson v. Indus. Comm., — Cal. App. —, (1921), 195 Pac. 719.

the general condition being further emphasized by a hernia of long standing."[65]

§ 405. **Latent Disease Accelerated by Accident Causing Disability.**—The fact that a latent disease was so accelerated by an accident as to produce disability, which would not have resulted in the absence of the disease, is immaterial under the compensation Act, where the disability is proximately due to the injury. "Appellant contends that the evidence shows that the said William Coleman was afflicted with syphilis at the time of the injury, and that his condition, subsequent to the accident in question, was identical to that of a normally developed syphilitic. The evidence as to the first alleged fact was conflicting, and the Industrial Board may have found to the contrary, which would be binding on this court on appeal. Again the court may have found that he was so afflicted at the time of such accident, but that such disease was latent, and that such accident accelerated it to the stage of disability. Under such facts, the existence of such disease would not of itself prevent a recovery. In re Bowers, (1917), 116 N. E. 842, and authorities there cited. Appellant finally contends that the doctrine to be applied under the facts of this case is one of degree: Degree of disability prior to injury; degree of disability caused entirely by the injury; degree of disability caused entirely by the disease; degree of disability which might have resulted from the disease alone. We cannot concur in this contention. There is no provision for the application of such a doctrine in the Workmen's Compensation Act of this state, and the courts of other jurisdictions have refused to recognize it under similar acts. In re Madden, 222 Mass. 487, 111 N. E. 379, L. R. A. 1916D, 1000; Hills v. Oval, etc., Co., 191 Mich. 411, 158 N. W. 214,"[66]

65. Udell v. Wagner, Peterson & Sullivan, 2 Cal. I. A. C. 113, 11 N. C. C. A. 56; Clark v. Geo. Taylor & Co., (1914), W. C. & Ins. Rep. 448, 11 N. C. C. A. 54; In re Browning, Ohio Ind. Comm., (1915), 11 N. C. C. A. 56; In re Emile J. Soudain, 2nd A. R. U. S. C. C. 87; In re Robert Harlin, 2nd A. R. U. S. C. C. 88; In re Geo. W. Marks, 2nd A. R. U. S. C. C. 89.

66. Indianapolis Abattoir Co. v. Coleman, 64 Ind. App.—, 117 N. E. 502, 1 W. C. L. J. 41; Geizel v. Regina Co., — N. J. —, 114 Atl. 328. See §§ 138, 290.

§ 406. **Further Disability.**—The requirement that notice of injury must be given within a certain time does not apply to a proceeding for further disability caused by the same injury.[67]

A further disability due entirely to the employee's own negligence is not compensable. But a subsequent accident, which is not the result of lack of ordinary care on the part of the injured employee, may be regarded as part of the proximate consequences of the original accident and compensable.[68]

"If there have been no proceedings commenced within 6 months from the date of the injury, and if there has been no payment of disability indemnity or agreement therefor, the employee is not entitled to institute proceedings grounded upon 'further disability' after the expiration of 6 months from the date of the injury."[69]

A finding by the board that the disability due to the original injury, had recurred or increased since the award, is sufficient to authorize an increase of compensation.[70]

The fact that an employee was able to return to the work he had been doing prior to the accident, for which an award for total temporary disability had been made, will not prevent the finding that there was continuous disability from the time of the accident to the time of the death, thus authorizing an award for the death found to be due to the original injury.[71]

§ 407. **Extent of Disability How and When Determined.**—Where the claimant, a miner, broke his leg above the knee, the commission found that he had sustained 70 per cent loss of the use of the left leg. On appeal the court said: "Plaintiffs in error contend that the commission and the court misconstrued the meaning of the phrase 'impairment of earning capacity,' erroneously

67. Employee's Credit Co. v. Indus. Comm., 177 Cal. 46, 169 Pac. 1001, 1 W. C. L. J. 467, 17 N. C. C. A. 169.

68. Head Drilling Co. v. Indus. Comm., 177 Cal. 194, 170, Pac. 157, 1 W. C. L. J. 470, 16 N. C. C. A. 550; Pac. Coast Co. v. Pillsbury, 171 Cal. 319, 153 Pac. 24, 16 N. C. C. A. 554.

69. Kaufmann v. Indus. Acc. Comm., 37 Cal. App. 500, 174 Pac. 690, 17 N. C. C. A. 168.

70. Squire-Dingee Co. v. Indus. Bd. of Ill., 281 Ill. 359, 117 N. E. 1031, 1 W. C. L. J. 331.

71. Western Indem. Co. v. Indus. Comm., 172 Cal. 766, 168 Pac. 663, 1 W. C. L. J. 478.

limiting it to the particular occupation in which claimant was employed when injured; that whereas the evidence shows that claimant may have sustained a 70 per cent 'impairment of earning capacity' as a miner, it conclusively appears that his general 'impairment of earning capacity' did not exceed 20 per cent; hence the finding and award of the commission are unsupported by any evidence. It appears that the rule contended for by plaintiffs in error for determining the 'impairment of earning capacity of claimants,' and which we will designate as 'Rule No. 1,' is, 'The degree of disability is to be determined by the claimant's general impairment of earning capacity without respect to any particular kind of labor,' to support which the following, among other authorities, are cited: Grammici v. Zinn, 219 N. Y. 322, 114 N. E. 397; Boscarino et. al. v. C. & D. Inc., 220 N. Y. 323, 115 N. E. 710, Ann. Cas. 1918A, 530; Modra v. Little, 223 N. Y. 452, Ann. Cas. 1918D, 177, 119 N. E. 853. Whereas, the rule contended for by defendants in error, and which we will designate as 'Rule No. 2,' is, 'The degree of disability is to be determined by the claimant's impairment of earning capacity as it relates to the kind of labor at which he was employed when injured,' to support which the following, among other authorities, are cited: Duprey v. Md. Cas. Co., 219 Mass. 189, 106 N. E. 686; Gillen v. O. A. & G. Corp., 215 Mass. 96, 102, N. E. 346, L. R. A. 1916A, 371. Both of these contentions may be wrong, as a simple illustration will demonstrate. An expert engraver, past midde age, engaged for years in that business, commanding high wages thereat and having no other special skill and no other regular occupation, is temporarily employed at very low wages carrying brick and motar in a wheelbarrow in building construction. While so employed he sustains an injury to his right hand, trivial in its effect to incapacitate him for general work, but making it wholly impossible for him ever again to secure employment as an engraver. Both the language and spirit of the act would be violated in his case by the application of Rule No. 1. The same man, under the same circumstances, engaged in the same occupation sustains an injury to his foot of such a character as to permanently incapacitate him from running a wheelbarrow, but having no effect whatever upon his earning capacity as an engraver. Both

the language and spirit of the act would be violated in his case by the application of Rule No. 2. We are of the opinion that the widest possible discretion is vested in the commission to determine whether, under a given set of circumstances and a particular state of the evidence, the first or second rule, or a combination of both, should be applied. Age, education, training, general physical and mental capacity, and adaptability, may, and often should, be taken into consideration in arriving at a just conclusion as to the percentage of impairment of earning capacity. The claimant in the instant case testified before the commission. They were thus enabled to make an application of these tests which is impossible to us. It will be observed that Dr. Hegner in his testimony gave due weight to these considerations, and Dr. Stuver did not claim to do more than fix a minimum per cent of impairment of earning capacity. There is sufficient in the record, as it comes before us, to demonstrate that the commission was justified in finding, and may have found, that as to claimant's ability to change his occupation, or perform general physical labor, he was a much older man than his years would indicate; that he was a person of low mentality and scant adaptability; that a 70 per cent. impairment of his earning capacity as a miner which might have been nothing more than a 5 per cent impairment of the general earning capacity of many men, was in fact, by reason of his special limitations, a 70 per cent impairment of his general earning capacity. It thus appears that the alleged error in the instant case goes solely to a finding of fact made by the commission upon conflicting evidence. That this court will not distrub such a finding so made is too well setled to admit of further discussion. Passini v. Industrial Comm, 171 Pac. 369; Industrial Comm. v. Johnson, 172 Pac. 422.'"[72]

An inquiry respecting the extent of an employee's injury should be directed under the Nebraska Act to his condition at the time of the examination or trial, subject to the right to make application

72. Globe Indem. Co. v. Indus. Comm.,—Colo.—, (1920), 186 Pac. 522, 5 W. C. L. J. 495; Old Ben Coal Corp. v. Indus. Comm., — Ill. —, (1921), 129 N. E. 772.

for modification any time after six months from the date of the award.[73]

Where an employee suffered an injury to the hand, which greatly impaired its usefulness and, also necessitated amputation of the little finger at the middle of the fourth metacarpal bone, the court said: "While the compensation act makes express provision for the loss of fingers, from the thumb down, it does not necessarily follow therefrom that an injury of the character here disclosed should be treated as a matter of law as the loss of the little and ring fingers only. If the nature of the injury in such a case, taken as a whole shows by relation a reduction in the power and usefulness of the hand, as well as the injury to and loss of the fingers, the court may, and properly should, find the fact accordingly, for the intent and purpose of the compensation act secures to the injured employee compensation for the disability, actually sustained. State ex rel. Kennedy v. District Court Clay County, 129 Minn. 91, 151 N. W. 530."[74]

In contruing the disability provisions of the Colorado Act the court said: "The extent of the disability having been ascertained, and the condition determined to be permanant, it was permissible for the Commission to ascertain and consider the life expectancy of claimant as an aid to fixing the aggregate amount due him under the statute. Inasmuch as the statute provides a maximum amount which a claimant may receive for permanent partial diability, his life expectancy is at least a proper element for consideration to assist in determining whether he is entitled to the full maximum allowance or a less sum. The insurance company vigorously assails the order compelling payment of $8.00 per week on the ground that claimant is entitled to only approximately $2.50 per week. Under the compensation act the only restriction is as to the weekly allowance which is limited to not more than $8.00 per week. Section 57 of the act provides, that after six months from the date of injury payments may be ordered made 'in such

73. Updike Grain Co. v. Swanson, 103 Neb. 872, (1919), 174 N. W. 862, 5 W. C. L. J. 289.

74. State ex rel. Broderick Co. v. District Court of Ramsey County, 144 Minn. 198, (1919), 174 N. W. 826, 5 W. C. L. J. 286.

manner as it' (the Commission) 'may determine to be for the best interest of the parties concerned.' The Act is to be construed liberally for the protection of the employee in reference to payments for disability. In re Meley, 219 Mass. 136, 106, N. E. 559. The basis of the objection to the payment of the sum found to be due under the compensation award, in payments of $8.00 per week, rather than the smaller sum, is that this increase in weekly payments operates to the detriment of the company, for the reason that the longer the time given it to complete the payment, the more likelihood there will be that claimant will die, and so relieve the insurer of further liability. While this may be, and probably is, true, as matter of fact, it is neither legal nor logical reason for denying the right of the Commission to use its discretion in the matter of the size of the weekly installments, after the lapse of the first six months immediately following the injury.'"[75]

Under the Colorado Act the amount of the award is to be based upon the proportion of the disability to normal ability, and the fact that the normal ability had been impaired by prior injuries is immaterial.[76]

But, as will be seen later, the decisions on this point are not uniform. When awarding compensation to a minor employee a finding based upon the probable wage of the employee upon attaining his majority is justifiable, but compensation based upon a wage which he would be likely to earn within a reasonable time after attaining his majority would be erroneous.[77]

The Wisconsin Act provides for a reduction of compensation for a permanent injury to an employee who is over 55 years of age, but this provision has no application in a proceeding to obtain

75. Employers' Mut. Ins. Co. v. Indus. Comm., 65 Colo. 284, 176 Pac. 314, 3 W. C. L. J. 91, 18 N. C. C. A. 457; Jones v. Kansas City So. Ry. Co., 143 La. 367, 78 So. 568, 2 W. C. L. J. 81.

76. Indus. Comm. v. Johnson, 64 Colo. 461, 172 Pac. 422, 2 W. C. L. J. 43.

77. Western Pac. R. Co. v. Indus. Comm., —Cal.—, (1919), 181 Pac. 787, 4 W. C. L. J. 348; Hyman Bros. Box & Label Co. v. Indus. Comm., —Cal.—, (1919), 181 Pac. 784, 4 W. C. L. J. 343.

death benefits, where the injury to an employee over 55 years of age resulted in death.[78]

Where, in proceedings under the Workmen's Compensation Act, the commission made an award in gross, to which there was no objection entered, the court held that the mere question as to time when a determination should be reached as to whether the case was one of partial or temporary disability, or total temporary disability, was in effect waived.[79]

The burden of establishing that the injury has resulted in the permanent loss of a member, rests upon the claimant.[80]

Neither inability to do certain work nor the actual earnings subsequent to the injury, standing alone, is sufficient to determine the extent of the disability.[81]

Under the Federal Act where there is no other evidence as to the duration of disability, the estimate of the medical officer connected with the commission will be accepted.[82]

For disability caused by medical treatment see Section 459 Chapter XI, Medical Benefits.

PERMANENT PARTIAL.

§ 408. **In General.**—Permanent partial disability arises out of the fact that some normal bodily function has been forever destroyed. Whether the destruction of that function be partial or complete is immaterial, so long as the destruction is not of a temporary nature, nor results in total incapacity of the employee.

Almost every one of the American Compensation Acts has a specific injury schedule showing definitely, certain injuries which in themselves constitute permanent partial disability, and the schedule also precribes the lenght of time during which compensation benefits are to be paid on account of these injuries, and the method of determining the amount in each case. The acts

78. City of Milwaukee v. Ritzow, 158 Wis. 376, 149 N. W. 480, 7 N. C. C. A. 498.

78. McDonald v. Indus. Comm. of Wis., 165 Wis. 372, 162 N. W. 345, 14 N. C. C. A. 351.

80. Modra v. Little, 223 N. Y. 452, 119 N. E. 853, 18 N. C. C. A. 789, 2 W. C. L. J. 534.

81. Old Ben Coal Corp. v. Indus. Comm., —Ill.—, (1921), 129 N. E. 772.

82. In re Louis Leinert, 2nd A. R. U. S. C. C. 140.

of Illinois, Massachusetts, Missouri, Nebraska, Ohio, South Dakota, Texas, Utah, Vermont, and Washington, provide that the specific schedule of benefits are in addition to other compensation, while the other Acts either specifically state, or are construed to make, the scheduled benefits exclusive of all other compensation for the specified injuries. But this does not mean that because an injury is not scheduled, it is thereby excluded from the operation of the acts. Such injuries are intended to come under the general provisions. It has however been held that if an injury to an employee does not come within the purview of the act, because it "provides no scale or gauge by which to determine what compensation should be provided," then the right to recover remains the same as it was before the act was passed.[83]

The omission of such injuries has apparently not been intentional, as the Acts have been promptly amended when the omission was discovered. For injuries in cases of permanent partial disability not scheduled provision is usually made for compensation on the basis of the percentage of disability actually suffered.

Under some Acts providing specific compensation for the loss of a member, it has been held that there must be an actual severance of the member, while under other acts this provision of the statute has been construed to mean "any impairment of the member which amounts to the loss of the use of that member."[84]

Permanent partial disability may exist although at the time the earning power of the employee may not have been impaired.[85]

A girl, employed as a pressfeeder, in some accidental way caught her hand in the machine she was operating and severely mangled and injured it. The trial court found that the little finger was so seriously mangled as to necessitate amputation at

83. Shinnick v. Clover Farms Co., 169 App. Div. 236, 154 N. Y. Supp. 423, 9 N. C. C. A. 342; Boyer v. Crescent Paper Box Co., 143 La. 368, 78 So. 596, 2 W. C. L. J. 71; Gibson v. Bellingham & Northern Ry. Co., 213 Fed. 488, 9 N. C. C. A. 343; Safety Insulated Wire and Cable Co. v. Court of Common Pleas, — N. J. —, 100 Atl. 846, B 1 W. C. L. J. 1171; Morris v. Muldoon, (1920), 180 N. Y. S. 319, 5 W. C. L. J. 570.

84. Clark v. Kennebec Journal Co., —Me.—, (1921), 113 Atl. 51.

85. De Zeng Standard Co. v. Pressey, 86 N. J. L. 469, 92 Atl. 278; Epsten v. Hancock Epsten Co., 101 Neb. 442, 163 N. W. 767, B 1 W. C. L. J. 1094.

the middle of the fourth metacarpal bone; that the third metacarpal bone was fractured, and, not having been reduced, united irregularly and in a curved shape thereby shortening it a quarter of an inch, impairing its power and usefulness; that as a consequence of the injury infection intervened as a contributing cause to lessen and reduce the effectiveness of plaintiff's left hand as a whole; and, further, that the usefulness of the hand had thereby been reduced and destroyed one-half, constituting a permanent partial disability within the meaning of the compensation act.[86]

Where an award is sought for a case of permanent partial disability, including any disfigurement which may impair the usefulness or opportunity of the injured employee, and the Legislature has not specifically provided for the particular injury complained of, the fact of disability and resulting diminution of earning power must be established as a matter of fact, for the act does not give compensation for the loss of a member, but for the loss of earning capacity actually caused by the loss of the member. So, where an employee suffered an injury resulting in the loss of a testicle, but the evidence failed to show that his earning capacity was thereby impaired, the court held that recovery could not be had for permanent partial disability, saying further: "The statute conclusively presumes that for the loss of, or the permanent loss of the use of a hand, arm, foot, leg, or eye, the proper compensation is 50 per cent of the wages for a specified number of weeks, respectively. For any other partial disability compensation is to be determined by proof of impairment of earning power. If an employee after the injury receives the same or higher wages than before, ordinarily that would indicate that his earning power had not been impaired. It is only intended to furnish compensation for loss of earning capacity. Without such loss there is no provision for compensation in the section, although even permanent physical injury may have been suffered, and the burden is upon the petitioner to show this loss and, with reasonable definiteness, its amount, * * * and, if it be suggested that the offer of the respondent to re-employ him at the former rate of wages did not necessarily imply permanency of employment, the fact still remains that

86. State ex rel. Broderick Co. v. District Court, 144 Minn. 198, (1919), 174 N. W. 826, 5 W. C. L. J. 286.

the petitioner has presented no evidence showing loss of earning capacity, or which would enable a court to make an award of compensation for partial incapacity."[87]

Where the Compensation Act defines "permanent injury" as one where the usefulness of a member is permanently impaired, or where any physical function is permanently impaired, it has been held that an injury resulting in the loss of a testicle is a "permanent partial injury," since the criterion of disability partial in character and permanent in quality is not limited to loss of earning capacity.[88]

Under the Washington act, as it existed in 1911 and prior to the amendment of 1917, the compensation provided was based upon certain schedules, and where the act, as it did in subsection (g) provided that one suffering a second permanent partial disability is to have his compensation adjusted, "according to the combined effect of his injuries, and that combined effect is to still leave him classified as permanently partially disabled, his second award must be made in view of 'his past receipt of money under this act,' and the claimant having received $625.00 for his first injury, was entitled to no more than the difference between that and the maximum of $1,500.00 for his second injury."[89]

"Claimant was found to have suffered a fracture of the base of the skull, usually a fatal injury, as a result of which his sight and hearing were impaired, and he suffered from dizziness, headache and general disability; he was unable to work at his occupation of mining coal, by which he was accustomed to earn $18.00 per week; he was unable to do any hard work for long at a time; and that his condition would probably be permanent. Upon these facts he was adjudged to have suffered a loss of twenty-five per cent of his earning capacity, and payment was ordered accordingly, with the right to have payment reduced at any time upon proof

87. Centlivre Beverage Co. v. Ross, — Ind. App. —, (1919), 125 N. E. 220, 5 W. C. L. J. 212; International Harvester Co. v. Indus. Comm., 157 Wis. 167, 5 N. C. C. A. 822, 147 N. W. 53, Ann Cases 1916 B. 330.

88. Hercules Powder Co. v. Morris County Court of Common Pleas, 93 N. J. L. 93, (1919), 107 Atl. 433, 4 W. C. L. J. 523; Clark v. Kennebec Journal Co., — Me.—, (1921), 113 Atl. 51.

89. Biglan v. Indus. Ins. Comm., 108 Wash. 8, (1919), 182 Pac. 934, 4 W. C. L. J. 650.

of an improvement in his physical condition. So far as the insurer is concerned, the findings and award could not well have been made more equitable, and were and are clearly within the letter and spirit of the compensation act."[90]

The workmen's compensation board may use the schedule of compensation for specific injuries, (section 18, of the Kentucky Act,) as a standard by which to measure the compensation to be allowed for injuries not specified, but falling within the general clause awarding compensation "in all other cases of permanent partial disability."[91]

An employee injured in the course of his employment is not to be deprived of his right to compensation for such injury and consequent diminished earning capacity, merely because his injury was not so serious as to totally disable him immediately following the injury. And where in pain and distress, and only through the friendly assistance of fellow workmen is he able to earn as much as before his injury, he may maintain an action for permanent partial disability.[92]

The recovery of compensation for permanent partial disability arising from injuries sustained, does not thereby exclude compensation for injuries resulting in temporary total disability coming under other sections of the act.[93]

The California Act, which specifies the compensation for partial disabilities amounting to 10 per cent, does not exclude partial disabilities below 10 per cent, and an employee who suffered 2¾ per cent disability should not be denied compensation because the proportion of his disability to total disability is less than 10 per cent.[94]

90. Employers' Mutual Ins. Co. v. Indus. Comm., 65 Colo. 284, 176 Pac. 314, 3 W. C. L. J. 91, 18 N. C. C. A. 470.

91. Nelson v. Kentucky River Stone & Sand Co., 183 Ky. 583, 209 S. W. 506, 3 W. C. L. J. 730.

92. Raffaghelle v. Russell, 103 Kan. 849, 176 Pac. 640, 3 W. C. L. J. 293, 18 N. C. C. A. 468.

93. In re Denton; In re Good, 64 Ind. App.—, 117 N. E. 520, 1 W. C. L. J. 69, 18 N. C. C. A. 451.

94. Mass. Bond & Ins. Co. v. Pillsbury, 170 Cal. 767, 151 Pac. 419, 11 N. C. C. A. 426, (1915).

"The payment of the temporary disability award, and the release thereon, was no bar to the subsequent proceeding for compensation for the permanent disability caused by the injury."[95]

A refusal to allow compensation for permanent partial disability was erroneous, where it appeared that the claimant sustained injuries resulting in permanent injury to the wrist, foot, and shortening of one leg, thereby impairing his efficiency as a workman. He was able to resume his usual occupation at the same wages he had been receiving prior to the injury. The court allowed recovery only for temporary disability. The court in reversing the award said: "Under the Workmen's Compensation Act of 1911 (Pamph. L. 1911, p. 134), the word 'disability' is not restricted to mere loss of earning power; and the fact that an injured workman was employed at the same work and the same wages as before the injury will not disentitle him to compensation under the act, if his efficiency has been substantially impaired."[96]

Where an employee suffered an injury resulting in a femoral hernia which was permanent unless operated upon, the award should have been for permanent disability, subject to a modification if it appeared that the employee unreasonably refused to submit to an operation.[97]

It has been held that a hernia is a permanent partial disability.[98] A number of the acts now have specific provisions in regard to hernia cases. Because of the differences in these provisions no general rule of value can be formulated.

A workman 60 years old was injured and awarded compensation for total incapacity for a period of three years, at the end of which time it was found that the incapacity due to the injury had ceased, but the employee was permanently partially incapacitated for work due to old age and obesity. The incapacity

95. Mass Bond & Ins. Co. v. Indus. Acc. Comm., 176 Cal. 488, 168 Pac. 1050, 1 W. C. L. J. 484, 18 N. C. C. A. 449.

96. Burbage v. Lee, 87 N. J. L. 36, 93 Alt. 859, 11 N. C. C. A. 428.

97. McNally v. Hudson & M. R. Co., 87 N. J. L. 455, 95 Atl. 122, 10 N. C. C. A. 185; Feldman v. Braunstein, 87 N. J. L. 20, 93 Atl. 679, 11 N. C. C. A. 430.

98. Newbroker v. N. Y. Susquehanna & W. R. R. Co., 38 N. J. L. 175.

caused by obesity, for which the employee had a natural tendency because of his age, was accelerated by the employee's lack of hard work for a great length of time. The House of Lords held that the arbiter did not err in denying compensation for the partial incapacity.[99]

An award for permanent disability should not be any larger for a man of advanced years, on the theory that an injury to him may be greater, nor should it be less on account of his youth, and the probability of complete recovery.[1]

Where a workman sustained injuries resulting in temporary total disability followed by permanent partial disability he was awarded 85 weeks for temporary total disability, and 75 per cent. for permanent partial disability, for which he was allowed $7.03 per week for 313 weeks. It was contended that no limit was placed by the act where temporary total disability was followed by permanent partial disability. After providing for total and partial disability awards, the Wisconsin Act provides: "In case of temporary or partial disability aggregate indemnity for injury to a single employee caused by a single accident shall not exceed four times the average annual earnings of such employee, and in case of permanent total disability aggregate indemnity for injury to a single employee caused by a single accident shall not exceed six times the average annual earnings of such employee. * * * The aggregate disability period shall not, in any event, extend beyond 15 years from the date of the accident." The court said: "While the statute is not as clear as it might be on this point, it appears to us that the construction placed upon it by the commission and the court below is the correct one. It is evident that the Legislature intended that the person who receives a permanent total disability should receive more compensation than one who is not completely and continuously disabled.

99. Clark v. George Taylor & Co., (1914), W. C. & Ins. Rep. 448, (1914), Sc. L. T. 145, 11 N. C. C. A. 54; In re Browning Ohio Ind. Comm., (1915), 11 N. C. C. A. 56; Udell v. Wagner, Peterson & Wilson, 2 Cal. Ind. Acc. Comm. 113, 11 N. C. C. A. 56; David v. Windsor Steam Coal Co., 4 B. W. C. C. 177, 6 N. C. C. A. 697.

C. A. 588.

1. Batemen Mfg. Co. v. Smith, 85 N. J. L. 409, 89 Atl. 979, 4 N. C.

There are but two classes provided for by the language of the statute, and if plaintiff cannot be placed within the one for which the maximum allowance is made he must necessarily fall within the other class, covering the cases of temporary or partial disability."[2]

Under the Kansas Act where an employee was earning $12 a week before the accident and he could earn only $3 a week subsequent to the accident, it was held that his compensation should be 50 per cent of the difference in his earnings before and after the accident.[3]

Under the Connecticut Act, an award for permanent injuries and specific losses, in compliance with the statutory provisions, includes any loss of time occasioned by the injury, and an award for the temporary total disability, following the amputation of a foot, in addition to the amount specified in the statute for loss of a foot was erroneous.[4]

It has been held to the contrary in other states.[5] In fact, as previously stated, the acts of six states expressly provide that the scheduled benefits shall be "in addition to all other benefits."

"The fact that plaintiff was able to and did perform some labor, part of the time, of the same character as he had previously performed does not impair the validity of the finding of permanent partial disability.[6]

Compensation may be allowed for permanent partial and also for temporary partial disability, where the temporary partial re-

2. Karges v. Indus. Comm., 166 Wis. 69, 162 N. W. 482, 18 N. C. C. A. 451.

3. Roberts v. Chas. Wolff Packing Co., 75 Kans. 723, 149 Pac. 413.

4. Bowne v. Stamford Rolling Mills Co., — Conn. —, (1920), 111 Atl. 215, 6 W. C. L. J. 515; Hardin v. Higgins Fuel Co., — La. —, (1920), 85 So. 202, 6 W. C. L. J. 446; Spring Canyon Coal Co. v. Indus. Comm., — Utah —, (1920), 193 Pac. 821, 7 W. C. L. J. 251.

5. Curtis v. Hayes Wheel Co.,—Mich.—, (1920), 178 N. W. 675, 6 W. C. L. J. 537; Haver Washed Coal Co. v. Indus. Comm.,—Ill.—, (1921), 129 N. E. 521; Stammers v. Banner Coal Co.,—Mich.—, (1921), 183 N. W. 21.

6. Chance v. Reliance Coal & Mining Co.,—Kan.—, (1920), 193 Pac. 889, 7 W. C. L. J. 201; Gailey v. Mfg. Co., 98 Kans. 53, 157 Pac. 431; Dennis v. Cafferty, 99 Kans. 810, 163 Pac. 461.

sults from other injuries than those received by the member, for which the award for permanent partial loss of use is allowed.[7]

The commission cannot allow compensation for disfigurement and loss of use of the same member.[8]

Where the evidence, upon review of a finding, justifies it, the board may order an employee to return to work at the wages offered by the employer and reduce the compensation payments to half the difference between wages earned before the injury and the wage thereafter offered.[9]

The compensation act provides compensation for the period of incapacity between the date of the injury and the time when it is determined that there will be a complete loss of use of the limb together with the compensation for the specific loss. In cases where no reasonable prognosis of the extent of the injury can be made no compensation for the specific loss will be made until sufficient time elapses to enable the board to estimate the extent of the injury.[10]

Compensation for partial disability runs from the date of the injury.[11]

§ 409. **Loss of or Injury to Eye.**—Where an employee suffers an injury to his eye which results in the loss of the sight of the eye to the extent of 90 per cent of the normal vision and the remaining 10 per cent is of no benefit to him in any vocational pursuit, he is not entitled to additional compensation for the entire and irrecoverable loss of the sight of the eye, as provided for in Art. 2, Sec. 12, Par. (b), of the Rhode Island Act, for this provision of the statute was intended to award additional compensation for the permanent loss of a specified member, and cannot be extended to cover a partial loss of a member.[12]

7. Slago Coal Co. v. Indus. Comm., — Ill. —, (1920), 127 N. E. 751, 6 W. C. L. J. 292.

8. International Coal & Mining Co. v. Indus. Comm., —Ill.—, (1920), 127 N. E. 703, 6 W. C. L. J. 278.

9. Frank v. Deemer Steel Casting Co.,—Del. Superior Ct.—, (1920), 110 Atl. 561, 6 W. C. L. J. 441.

10. Wrenn v. Conn. Brass Co., — Conn. —, (1921), 112 Atl. 638.

11. Nieminen v. Isle Royal Copper Co., — Mich. —, (1921), 183 N. W. 9.

12. Keyworth v. Atlantic Mills,—R. I.—, (1919), 108 Atl. 81, 5 W. C. L. J. 116.

Where an injured eye is, with the aid of a proper glass, nearly normal for many purposes, it does not amount to the loss of an eye, even though it is undisputed that there is a permanent impairment of the vision of the eye as the result of the injury.[13]

In construing the Minnesota Act, in reference to eye injuries the Supreme Court of that State said: "A settlement made by the workman with his employer and the insurer of the employer on the mutual assumption that he was entitled to compensation for the loss of one eye only, and a release executed on the same assumption, does not bar him from thereafter claiming compensation for the injury to the other eye."[14]

Where an employee sustained an injury which not only destroyed the sight of the eye but also necessitated the removal of the eye, the court in a Kentucky case said: "Looking at our act, we find that it provides compensation at a certain rate for 'the loss of a thumb,' the 'loss of a first finger,' the 'loss of a hand,' the 'loss of an arm the 'loss of a foot,' the 'loss of a leg,' etc., thus showing that the compensation therein provided for was confined to the loss of the particular member named. When it deals with the eye however, it does not provide for compensation for the loss of the eye itself, but solely for the 'loss of the sight of an eye.' If it be true, and there is no reason to doubt the soundness of the rule, that the purpose of the Legislature was to confine the fixed compensation provided for specific injuries to those injuries and no other, and that the compensation allowed for a specific injury was not payable for a less injury, the rule should work both ways, and the compensation provided for a particular injury should not be held to include a greater injury. Here, the employee lost, not only the sight of his eye, but the eye itself. His injury therefore was greater than the mere loss of the sight of the eye. That being true, his case does not fall within the schedule making compensation solely for the loss of the sight

13. Valentine v. Sherwood Metal Working Co., 189 App. Div. 410, 178 N. Y. S. 494, (1919), 5 W. C. L. J. 115; Frings v. Pierce Arrow Motor Car Co., 182 App. Div. 445, 169 N. Y. S. 309, 1 W. C. L. J. 864, 184 N. Y. App. Div. 445, 18 N. C. C. A. 455.

14. Zinken v. Melrose Granite Co., 143 Minn. 397, (1919), 173 N. W. 857, 4 W. C. L. J. 614.

of an eye, but falls within the general provision, supra, awarding compensation 'in all other cases of permanent partial disability.'"[15]

Where a servant suffered an injury to his eye resulting in the loss of sight of that eye, except when aided by correcting lenses and with the other eye closed, the court, in holding that there was a total loss of one eye, said: "Plaintiff in error contends that should Kaage lose the sight of his good eye he could by the use of lenses gain the use of the injured eye, and therefore he has not lost the sight of the injured member. The question before this court is whether or not this man has for all practical uses and purposes lost his eye. The application of laws of this character should not be made to depend upon finespun theories based upon scientific technicalities, but such laws should be given a practical construction and application. For all practical purposes, when a person has lost the sight of an eye he lost the eye, and to say that the statute providing compensation for the loss of the sight of an eye does not apply here because of the remote possibility of Kaage losing his good eye, whereby he can through artificial means gain a certain amount of use of the injured member, is to place a construction on a remedial act which deprives it of all practical effect. Such could not have, been the intention of the Legislature in passing this act. It was said by this court in Mark Mfg. Co. v. Industrial Com., 286 Ill. 620, 122 N. E. 84, where the employee lost the greater portion of his hand: 'The fact that by the use of a mechanical appliance or some substitute for the hand the defendant in error is able to perform manual labor to some extent is not inconsistent with the complete loss of the use of the hand for practical work. The incapacity to use need not be tantamount to an actual severance of the hand. It is enough that the normal use has been entirely taken away. In re Meley, 219 Mass. 136 (106 N. E. 559); Floccher v. Fidelity & Deposit Co., 221 Id. 54, (108 N. E. 1032); Lamieux v. Contractors' Mutual Liability Ins. Co., 223 Id. 346 (111 N. E. 782)."[16]

15. Nelson v. Kentucky River Stone & Sand Co., 183 Ky. 583, 206 S. W. 473, 3 W. C. L. J. 132, 18 N. C. C. A. 456.

16. Juergens Bros. Co. v. Indus. Comm., 290 Ill. 420, (1919), 125 N. E. 337, 5 W. C. L. J. 369; Stefan v. Red Star Mill & Elevator Co.,—Kan.

"The claimant lost the use of an eye. She was nearsighted, having not to exceed 50 per cent, vision. The appellants claim she should only be allowed for the loss of one-half vision. The commission made an award for the permanent loss of the use of an eye. From such an award this appeal is taken.

"The statute does not provide that the loss of the use of an eye shall be compensated by an award based upon the amount of vision which existed previous to the accident, whether it be 50 per cent. or 80 per cent. of vision lost. It awards specific compensation for the loss of an eye. It is matter of common knowledge that very few persons have complete and perfect vision. The claimant was working with defective vision. So far as appears, her work was entirely satisfactory to her employer, at least so far as the wages she received.

"The wages received by her must be considered her wage-earning capacity with defective vision. She lost the use of her eye, such as she had, and is entitled to compensation therefor, based upon her earning capacity." [17]

Where an employee lost 80 per cent of the vision of an eye the court in holding that the claimant had not lost the use of the eye, said: "Here the claimant can make use of the sight remaining in his right eye in many ways. He may not be able to follow any vocation which requires reading or other relatively fine work, as the evdence is, but he can pursue some calling similar to that in which he was engaged when injured." [18]

Where a workman lost the sight of an eye and the jury found that he would be partially incapacitated as the result of impaired earning capacity, the court held that the jury was warranted in finding that there was some substantial permanent impairment.[19]

—, (1920), 187 Pac. 861, 5 W. C. L. J. 695; Smith v. F. & B. Const. Co., 3 W. C. L. J. 189, 185 App. Div. 51, 172 N. Y. S. 581, 18 N. C. C. A. 797, Titchener & Co. v. Indus. Bd., 202 Ill. App. 296, 18 N. C. C. A. 796.

17. Hobertis v. Columbia Shirt Co., Inc. 186 App. Div. 397, 173 N. Y. Supp. 606, (1919), 3 W. C. L. J. 498.

18. Boscarino v. Carfagno & Dragonette, 220 N. Y. 323, 115 N. E. 710, Ann. Cas. 1918A 530, 115 N. E. 710, 18 N. C. C. A. 796, Rev'g. 175 App. Div. 286, 161 N. Y. Supp. 562.

19. Oliver v. Christopher, 98 Kan. 660, 159 Pac. 297, 18 N. C. C. A.454.

But under the British Act, where the employee was able to return to work, compensation was denied on the grounds that there was no permanent incapacity.[20]

The Massachusetts Act provides additional compensation for certain specified injuries, among others, "the reduction to one tenth normal vision in either eye with glasses." So where an injury to a workman's eye resulted in inability to use his eyes in conjunction, and only when the good eye was covered could he obtain any practical use of the injured eye, and because of the lack of co-ordination both eyes could not be used together, the board found that "the employee has sustained a deduction of vision in the injured eye to one-tenth of normal vision with glasses." Affirming a decree of the superior court, which confirmed the award, the court said: "In doing so, we think the board correctly interpreted the intention of the legislature. The construction contended for by the insurer would lead to the unreasonable result of allowing compensation for the loss of an eye, but none for an injury that rendered the eye worse than useless. On the testimony of their own expert the employee would enjoy normal vision with the left eye if the injured eye were entirely removed." [21]

Where an employee sustained an injury to his eye but immediately returned to his employment, and later a cataract developed causing loss of sight of the eye, it was contended that since the applicant lost no time he was not entitled to compensation, except for two days he laid off at the time of the accident. The court overruled this contention, saying: "The compensation fixed by the statute for the loss of an eye does not depend on the loss of time, but is fixed at 50 per cent. of the average weekly wage during 100 weeks." [22]

In an English case, where an employee was making 35s. a week prior to the accident because of shortage of labor, and subsequent to the injury he was earning only 30s. a week at other work, it was held that he was entitled to an award based upon

20. Law v. Wm. Baird & Co. Ltd., (1914), 1 W. C. & Ins. Rep. 140, (1914), 1 Sc. L. T. 261, 6 N. C. C. A. 880; Gorell v. Battelle, 93 Kan. 370, 144 Pac. 244.

21. In re O'Brien, 228 Mass. 211, 117 N. E. 1, 18 N. C. C. A. 456.

22. Joliet Motor Co. v. Indus. Bd., 280 Ill. 148, 117 N. E. 423, 15 N. C. C. A. 75.

the difference between his earnings irrespective of the fact that the labor market was inflated.[23]

Where an employee suffered an injury to his eyes to the extent of 80 per cent, which was partial in character but permanent in quality, and the trial court awarded 80 weeks for each eye, the court, on appeal, held that the trial court overlooked the provision that the loss of both eyes shall constitute a permanent disability and that the injury fell under clause B of the New Jersey Act, and under this clause the petitioner was entitled to compensation for 320 weeks.[24]

Under the Wisconsin Workmen's Compensation Act, if the employee's earning capacity has not been impaired for following the employment he was pursuing at the time of his injury, there can be no recovery for permanent disability. An award cannot be based on the theory that the loss of an eye may impair his earning capacity in other employments.[25] The Wisconsin Act was amended in 1913 so as to allow an award of compensation only when the employee is disabled for work in any employment.

Injury to an eye, making it impossible for the plaintiff to gauge distances as well as he could before the injury, was held to be a sufficient impairment of the plaintiff's efficiency to entitle him to an award for partial disability.[26]

Where an employee lost one-half the vision of one eye, but returned to work at the same wage he was receiving prior to the injury, it was held that he was not entitled to compensation for the impairment of his vision, but only for the loss of time actually disabled, for the Michigan Act does not provide compensation for this injury, and in the absence of specific provision for an injury the courts cannot, in the absence of actual disability, award compensation.[27]

23. Heathcote v. Haunchwood Collieries Ltd., (1917), W. N. 318, 62 S. J. 53, 52 L. J. 405, 15 N. C. C. A. 1072.

24. Vishney v. Empire Steel & Iron Co., 87 N. J. L. 481, 95 Atl. 143, 11 N. C. C. A. 427.

25. International Harvester Co. v. Industrial Commission of Wis., 157 Wis. 167, 147 N. W. 53, 5 N. C. C. A. 822.

26. Oliver v. Christopher, 98 Kan. 660, 159 Pac. 397.

27. Hirschkorn v. Fiege Desk Co., 184 Mich. 239, 150 N. W. 851.

Since the compensation for the loss of members is not dependent upon decrease in earning capacity under the Minnesota Act, an employee sustaining a partial loss of the use of an eye is entitled to compensation for the proportionate number of weeks the loss bears to the number allowed for the loss of the entire vision.[28]

Where an injury to an employee's eyes could be reduced from 90 per cent to 50 per cent by the use of glasses, it was held that compensation should be awarded on the basis of the vision lost after glasses were fitted.[29]

The entire loss of an eye, which was already affected by a previous accident, was held to entitle an employee to an award for the total loss of the sight of one eye.[30]

And where it was found that the sight of an eye might be restored by an operation, the court held that it must act upon the facts as found at the time the proceeding was taken, and awarded, compensation for the loss of the eye.[31]

But where the effect of an injury to an eye was uncertain the award was made for temporary disability, and the case left open until the final result of the injury was determined.[32]

Under the Wisconsin Act a loss of four-fifths of the sight of one eye entitled the workman to four-fifths of the allowance for total blindness of one eye.[33]

Where a carpenter who had been previously blind in one eye sustained an injury resulting in loss of 75 per cent of the vision of the other eye, so that he could no longer follow his trade, but could go about the town, read signs and locate offices, he was entitled to compensation for the loss of one eye and not for total disability.[34]

28. Chiovitte v. Zenith Furnace Co.,—Minn.—, (1921), 181 N. W. 643.

29. Cline v. Studebaker Corp., 189 Mich. 514, 155 N. W. 519.

30. Purchase v. Grand Rapids Refrigerator, 194 Mich. 103, 160 N. W. 391.

31. Feldman v. Braunstein, 87 N. J. L. 20, 93 Atl. 679, 11 N. C. C. A. 430.

32. Arcangelo v. Gallo & Laguidara, 177 App. Div. 31, 163, N. Y. Supp. 727.

33. Stoughton Wagon Co. v. Myre, 163 Wis. 132, 157 N. W. 522.

34. Collins v. Albert A. Albrecht Co.,—Mich.—, (1920), 180 N. W. 480, 7 W. C. L. J. 309.

§ 410. **Loss of Arm, Hand, or Finger.**—Where a workman suffered an injury whereby several of his fingers were permanently disabled, the court, in determining the amount of compensation recoverable under the Louisiana Act, said: "By the terms of subsection (c) of section 8 of the statute, plaintiff was entitled to $150 compensation for the loss of half of his index finger, that is, half of $10 a week for 30 weeks; and $400 for the loss of the second and third finger, that is, for each finger, $10 a week for 20 weeks. In addition to those sums, the court allowed $200 for the loss of the fourth finger. Our opinion, however, is that, for a case to come within one of the provisions for an injury particularly specified in subsection (c), as for the loss of a finger, thumb, hand, etc., the member must have been severed or amputated. If a finger, thumb, or hand, as the case may be, has been permanently disabled, either partially or totally, but not severed from the body or amputated, the compensation is to be measured by the general provisions of the first paragraph of subsection (c) of section 8 of the statutes; that is, one half of the loss of wage-earning capacity, not exceeding $10 a week for a period not exceeding 300 weeks. It is true, plaintiff was back at his work, attending to the pumping machinery, 2 months after the accident. But he was not able to start the engine, and therefore it cannot be said that he was able to earn as much as he earned before the accident. Other workmen, through sympathy, would start the engine for him; and defendant, perhaps through sympathy, paid him the same wages that he had earned before the accident. He was discharged however, before the end of 8 months. The expression, 'In no case shall payments be made under more than one clause of this subsection,' cannot be construed to mean that, though an employee has suffered the loss of three fingers, he is only entitled to compensation for the loss of one finger. Immediately following the provisions for the loss of fingers and thumbs is a proviso that makes it plain that the compensation to be allowed for the loss of fingers and thumbs is not limited to the amount allowed for the loss of one finger or thumb, viz: 'Provided, however that in no case, shall the amount

received for more than one finger exceed the amount provided in the schedule for the loss of a hand.' "[35]

Where a workman suffered an injury to his hand which resulted in its loss of all its fingers and thumb, the court allowed compensation for 150 weeks at 50 per cent of his weekly wages, as provided by the statute for the loss of a hand. "The plaintiff contended that he should be allowed compensation as for permanent total disability, or 50 per cent. of his weekly wages for 400 weeks, upon the theory that, being uneducated and dependent upon manual labor for a living, he is totally incapacitated to do any work of that character. However, it is a fact, illustrated in everyday life, that many men are working at manual labor and earning a livelihood even where the entire arm or leg has been lost, while in this case plaintiff did not lose the hand, but all of the fingers, including the thumb. He still has the stub, or hand, minus the fingers, which will undoubtedly be of great use to him in performing work which he may be able to obtain. In any event, the statute has provided a definite scale of compensation for an injury of this kind and it fixes it for the loss of a hand at one-half of the weeks' wages for a period of 150 weeks."[36]

"The evidence was to the effect the hand was crushed and four fingers and a portion of the palm amputated, leaving about an inch of the palm and the thumb. Tapp testified that he had some use of his thumb; that he 'could move it just a little.' Section 6 art. 2, Oklahoma Workmen's Compensation Act (Laws 1915, c. 246), provides that permanent loss of the use of a hand shall be considered as the equivalent of the loss of such hand. Evidently the Legislature contemplated there would be cases in which the loss of a portion of the hand would produce loss of the use of the hand, and this case appears to be of that nature. In Rockwell v. Lewis, 168 App. Div. 674, 154 N. Y. Supp. 893, where the servant lost three fingers and the fourth finger was rendered stiff and practically useless, the award for permanent loss of the use of the

35. Norwood v. Lake Bisteneau Oil Co., 145 La. 823, 83 So. 25, 5 W. C. L. J. 76; King v. Davidson, — Mich. —, 161 N. W. 841, A 1 W. C. L. J. 957.

36. Smith v. White, 146 La. 313, (1920), 83 So. 584, 5 W. C. L. J. 531.

hand was sustained. In Fieman v. Albert Mfg. Co., 170 App. Div. 147, 155 N. Y. Supp. 909, where the accident necessitated amputation of the fingers at the first phalange, which resulted in stiffness, so that the remainder of the finger became practically useless, it was held that the finger must be deemed to have been lost, although not actually amputated and an award was sustained for the entire amount that could have been recovered for the loss of such finger. In the case of Massachusetts Employees' Ins. Ass'n. 219 Mass. 136, 106 N. E. 559, it was held that a hand 'is incapable of use' when the injuries are such that the hand cannot be used in the ordinary manner, and is capable of use only as a hook; it not being necessary that the incapacity be tantamount to an actual severance."[37] The award on the basis of the permanent loss of the hand was affirmed.

In a case in which the supreme Court of Wisconsin had under consideration the question whether an employee, who had suffered an impairment of the use of his arm to the extent of one-half, should be compensated under the schedule providing a certain compensation for "the loss of an arm at the elbow," the court, in denying the employee's right to compensation under that provision, said: "The theory of the statute seems to be to make provision in the schedule, subd. 5, for certain specific injuries, and to leave all other injuries to be compensated for under other general provisions of the act. It is the opinion of the court, therefore, that the injury to Leipus does not fall within the schedule of fixed compensation designated in the statute under which it was classed by the commission, namely, 'the lose of an arm at the elbow.' Obviously the 'loss' of a member designated in the schedule has reference, not to the impairment of the member by the injury, but to the physical loss of it. All through the schedule there is nothing to indicate that impairment of a member was intended to be loss of a member, or that reduction of the efficiency of the member one-half would be one-half loss of the member. 'The loss of an arm at the elbow,' or 'the loss of a forearm at the

37. Bristow Cotton Oil Co. v. State Indus. Comm., — Okla. —, (1920), 188 Pac. 658, 5 W. C. L. J. 884.

lower half thereof,' does not mean the impairment of the arm, but the actual physical severance of it. The fact that the schedule so specifically fixes the precise injury for which compensation is allowed excludes the idea that the schedule, covers any other or different injury. In every instance the loss is specifically defined. The whole schedule is so specific that it is difficult to see how the Legislature could have intended that an injury to an arm impairing its usefulness 50 per. cent., or any degree, would come within the schedule. It seems from the whole act that the purpose of the Legislature was to confine the fixed compensation named in the schedule in subdivision 5 to the specific injuries named therein."[38]

In a New York case, the Industrial Commission had found that the claimant had lost 75 per cent. of the use of his right hand.

"His weekly wages being $35.09, it awarded him $20.00 a week for 183 weeks. Unanimously approving the findings of fact, the Appellate Division altered this award to $15 a week for 244 weeks. In this it erred. The act fixes but one rate of compensation for injuries. The workman is to receive two-thirds of his weekly wages, not exceeding a certain sum. The extent of his injuries limits, not the amount of these payments, but the time during which they are to continue. If for the loss of a hand that time is 244 weeks, for the loss of three-fourths of the hand, it is 183 weeks. The weekly compensation for the loss of a hand, arm, foot, leg or eye is not to exceed $20.00 a week. Permanent loss of the use of any such member is equivalent to the loss. The same measure applies to it. In other cases $15 is the limit. In 1917 an award was authorized for the proportionate loss of the use of a hand. Clearly the compensation for such proportionate loss is intended to be some fraction of the amount allowed for the total loss. The weekly limit is $20.00, not $15.00."[39]

Where the medical testimony showed that an injury necessitating the amputation of the forearm and wrist, though not de-

38. Northwestern Fuel v. Leipus et al., 161 Wis. 450, 152 N. W. 856, Ann. Cas. 1918A, 533, 9 N. C. C. A. 347.

39. Phonville v. N. Y. & Cuba, S. S. Co., 226 N. Y. 618, (1919), 123 N. E. 258, 4 W. C. L. J. 270.

stroying the use of the arm entirely, had taken away a great deal of its function, it was held that an award based upon the "loss" of an arm was justifiable.[40]

Where the tip of the index finger of the right hand had been crushed, the nail taken away and part of the flesh, an award for the loss of one-half the finger was erroneous. The court said: "It is a 'loss of the first phalange,' not of a part thereof, which is made equivalent to the loss of one-half of the finger. New York Workmen's Compensation Law (Consol. Laws, c. 67) Sec. 15, subd. 3. It is not necessary that every particle of the first phalange be lost. Yet it is necessary to show that 'substantially all of the portion of the finger so designated has been lost.' Matter of Petrie, 215 N. Y. 335, 109 N. E. 549. A loss of one-quarter of the first phalange is not the loss of the entire phalange. Thompson v. Sherwood Shoe Co., 178 App. Div. 319, 164 N. Y. Supp. 869. The loss under consideration here was but little more than that considered in the Thompson Case. It certainly did not approximate a loss of substantially all of the first phalange, which was made the criterion by the Petrie Case. The award was therefore erroneous."[41]

Where an employee had previously lost part of one finger, but nevertheless had use of the hand, and by a later accident not resulting in total severance, totally lost the use of the hand, the court said: "The permanence of the loss of use is apparent, and while the defendant in error is able to perform some acts with his thumb and the remains of his finger, they are not of such a character as to be of any practical value in manual labor. The fact that by the use of a mechanical appliance or some substitute for the hand the defendant in error is able to perform manual labor to some extent is not inconsistent with the complete loss of the use of hand for practical work. 'The incapacity of use need not be tantamount to an actual severance of the hand; it is

40. Steein v. C. R. Wilson Body Co., 205 Mich.—, (1919), 171 N. W. 352, 3 W. C. L. J. 763, 18 N. C. C. A. 467; Choctaw Portland Cement Co. v. Lamb, — Okla. —, (1920), 189 Pac. 750, 6 W. C. L. J. 207.

41. Tetro v. Superior Printing & Box Co., 185 App. Div. 73, 172 N. Y. S. 722, 3 W. C. L. J. 360, 18 N. C. C. A. 459.

enough that the normal use * * * has been taken entirely away.' In re Meley, 219 Mass. 136, 106 N. E. 559 Floccher v. Fidelity & Deposit Co., 221 Mass. 54, 108 N. E. 1032; Lemieux v. Contractors' Mutual Liability Ins. Co., 223 Mass. 346, 111 N. E. 782; Rockwell v. Lewis, 168 App. Div. 674, 154 N. Y. Supp. 893. Though the employee had previously lost a part of one finger, he had the use of the hand, with a capacity somewhat reduced by reason of the defect. The fact that his hand was not perfect did not render its loss any less complete. As the result of his injury he has totally lost the use of the hand, which he previously had, and under the statute he is entitled to compensation for that loss. Wabash Railway Co. v. Industrial Com. (No. 12274), 286 Ill. 194, 121 N. E. 569; In re Branconnier, 223 Mass. 273, 111 N. E. 792; Schwab v. Emporium Forestry Co., 216 N. Y. 712, 111 N. E. 1099. The fact that he might have recovered for the first injury did not reduce the amount of compensation to which he is entitled for the loss of the use of his hand.''[42]

Where an injury to the arm necessitated its amputation below the elbow resulting in the employee's permanent loss of use of his arm, the court said: ''While the act declares that amputation at any point between the elbow and wrist shall, ipso facto, be considered the equivalent of the loss of a hand, it further provides, in the same clause, that permanent loss of the use of an arm shall be equivalent of its loss. This can have but one meaning, and that is the permanent loss of the use of an arm, with or without amputation, resulting from injuries sustained by a workman, shall be the equivalent of the actual loss of the arm. If in the present case there had been no amputation, but the arm had been so crushed as to hang permanently useless at the side of the claimant, could his right to compensation for 215 weeks be questioned? The finding of the referee is that, as the result of the injuries which he sustained in the course of his employment, he has permanently lost the use of his arm, and the amputation

42. Mark Mfg. Co. v. Indus. Comm., 286 Ill. 620, 122 N. E. 84, 3 W. C. L. J. 594.

which necessarily followed is not a determining factor in fixing the basis upon which compensation is to be allowed. This was the correct view of the learned court below, as expressed in the following construction which it placed upon the words of the statute:

'They were intended to cover or include all cases wherein there is a permanent loss of the use of the entire member mentioned in the act, without regard to the point of amputation, as well as cases wherein such loss is sustained from injuries not requiring amputation.' "[43]

Where an employee lost an arm and it was shown that he had recovered as far as possible from the injury and was capable of performing light work, the court upon application reduced the award for total disability to an award for partial disability.[44]

Where a carpenter lost a finger as the result of an injury, which apparently did not incapacitate him from pursuing his usual work, the industrial commission found that the disability amounted to 20¼ per cent. In affirming the award and holding that the ability to do the same work was not the sole measure of disability, the court said: "The extent of disability occasioned by an injury is not incapable of exact measurement. The percentage of such disability is a matter to be determined by the commission in the exercise of its sound discretion, based upon a fair view of all the circumstances. Its conclusion on this matter is the determination of a question of fact and is not subject to review by the courts unless palpably contrary to the undisputed evidence. We cannot say that the finding that Immel's injury caused a permanent disability of 20¼ per cent is contrary to the evidence."[45]

43. Pater v. Superior Steel Co.,—Pa.—, (1919), 106 Atl. 202, 3 W. C. L J. 793, 18 N. C. C. A. 447.

44. Silcock & Sons, v. Golightly, (1915), 1 K. B. 748, (1915), W. C. & Ins. Rep. 164, 11 N. C. C. A. 31.
18 N. C. C. A. 452.

45. Frankfort Gen. Ins. Co. v. Pillsburry, 173 Cal. 56, 159 Pac. 150. 18 N. C. C. A. 452.

Under the section of the act allowing compensation for the loss of the first phalanx of the finger it must appear that substantially all of the portion of the finger so designated has been lost. "It could not have been the purpose of the legislature to enact that a loss of a fraction of the first phalange, so slight as to be scarcely perceptible to the naked eye, should be equivalent to the loss of half the finger."[46]

Where a woman lost one-eighth of the phalanx of her finger, the court said: "We do not think it was the intent of the Workmen's Compensation Law that an injury resulting no more seriously than simply in the severance of so small a piece of the tip of the finger should entitle a claimant to an award for the loss of the whole phalange. Unquestionably, the claimant is entitled to the award of compensation for the injury she has sustained, even though not to the extent of the award heretofore made."[47]

Where the claimant lost one fourth inch off of the tips of two fingers, the court, in reversing an award for the loss of the phalanx of the finger, said: "We think the award of the commission for the loss of the first phalange of each finger and the consequent loss of one-half of the finger was not justified, and that the award, instead of being based upon permanent partial disability, should have been of 66⅔ per centum of the difference between the claimant's average weekly wage and his wage-earning capacity in the same employment or otherwise during the continuance of such partial disability."[48]

Where the first phalanx was entirely amputated and a small chip out of the second phalanx, the court held that the award

46. Mockler v. Hawkes, 173 N. Y. App. Div. 333, 158 N. Y. Supp. 759, 18 N. C. C. A. 460; In re Petrie, 215 N. Y. 335, 109 N. E. 549, 18 N. C. C. A. 459, aff'g. 165 N. Y. App. 561, 151 N. Y. Supp. 307.

47. Gieger v. Gotham Can. Co., 177 App. Div. 29, 163 N. Y. S. 678, 18 N. C. C. A. 460; Contro, H. K. Toy & Novelty Co. v. Richards 64 Ind. App. —, 117 N. E. 260, 18 N. C. C. A. 460.

48. Ide v. Faul & Timmins, 179 App. Div. 567, 166 N. Y. S. 858, 18 N. C. C. A. 461; Thompson v. Sherwood Shoe Co., 164 N. Y. S. 869, 178 App. Div. 319, 18 N. C. C. A. 461.

should have been for the loss of half of the finger instead of the whole finger.[49]

In an earlier New York case, where a portion of the second phalanx of the index finger was taken in amputating the first phalanx, the court held that an award for the total loss of the finger was justifiable. That any other construction would require a holding that the injury came within "other cases," as defined in the New York Workmen's Compensation Act, which might result in continuing liability largely in excess of that provided for the entire loss of a finger.[50]

Where the statute provides specific compensation for the loss of a finger and an employee loses several fingers, it is erroneous for the commission to multiply the amount allowed for one finger by the number of fingers lost, for in this way it would be possible for the award to exceed the amount allowed for the loss of an entire hand. The injury should be compensated under the general provision making it discretionary with the board to determine the amount to be awarded.[51]

Where a claimant lost three fingers, and the statute made no provision for the loss of a part of a hand, (but has since been amended to so provide), the court, in reversing an award for the loss of claimant's hand, said: "It is therefore manifest that the commission cannot determine, in a case like this, that a part of the hand is lost, and award a corresponding part of the compensation fixed for the loss of a hand. If the hand is not lost, but is injured otherwise than by the loss of the thumb or certain fingers, or part of them, the compensation must either rest upon the loss of the separate members, or must fall under the provision as to other injuries which will be compensated for by the difference between the earning power before and after the injury."[52]

49. Baron v. National Metal Spinning & Stamping Co., 182 App. Div. 284, 169 N. Y. S. 337, 18 N. C. C. A. 462.

50. Fortino v. Merchants' Despatch Transp. Co., 171 App. Div. 956, 156 N. Y. S. 262, 18 N. C. C. A. 462.

51. In re Maranovitch, 64 Ind. App. —, 117 N. E. 530, 18 N. C. C. A. 463.

52. Adams v. Boorum & Pease Co., 179 N. Y. App. Div. 412, 166 N. Y. Supp. 97, 18 N. C. C. A. 467.

Where the industrial commission awarded compensation for the total loss of the hand of a girl who lost the index, middle, and ring fingers at a point one-quarter of an inch back of the metacarpal bones, the little finger was amputated at the second joint and the thumb was injured and somewhat sensitive, the court reversed the award holding that, since the injury did not incapacitate the claimant for the work she was preparing herself to follow, that of stenographer and telegraph instrument operator, the award should have been based on the allowance for loss of fingers.[53] So far as the operation of the typewriter is concerned, it would appear that the commission's finding of fact in this case was more accurate than the decision which disturbed that finding.

Where compensation was allowed for the loss of fingers of a hand, and subsequently the commission made an award for the loss of the hand, it was contended by the employer that the commission was without authority to make an award for more than the awards specifically provided for the loss of the fingers. The court in affirming the award said: "We do not recognize the theory that the question of the use of the hand is to be determined by the particular work in which the claimant has been engaged; the act has not attempted to insure the workman in his particular avocation for life. It simply undertakes to compensate for the injury sustained, and the question presented to the commission is not whether the hand is permanently useless for a particular work, but whether it is useless for any kind of work to which the claimant may be adapted. We have no doubt, however, that where the loss or injury to fingers and thumb results in permanent loss of the use of the hand in the practical everyday work of the individual, the commission is authorized to recognize this fact and to treat the hand as lost in fixing the compensation. That is the natural and logical meaning of the language, which seeks to do approximate justice to the individual, and it should not be construed to work an injustice in a case such as is here presented."[54]

53. Barringer v. Clark, 184 App. Div. 695, 172 N. Y. Supp. 398, 18 N. C. C. A. 467.

54. Rockwell v. Lewis, 168 N. Y. App. Div. 674, 154 N. Y. Supp. 893, 18 N. C. C. A. 791; Donohue v. McKaig-Hatch Inc., 223 N. Y. 572,

Where an employee lost the first, second and third fingers and the first phalanx of his fourth finger of his right hand, which injury incapacitated him for the work he had been following, the court, in reversing an award for the loss of the hand, said: "The fact, if it existed, that the injuries barred the claimant from the employment or the particular occupation or vocation he was engaged in when he received them does not, in and of itself, tend to prove that the hand or the use of it was lost. It is not within the letter or spirit of the law or the legislative intention that an injury to a limb or member of an employee incapacitating him for the particular employment should establish that he was incapacitated for employment permitting or involving the use of the limb or member as injured. It is a matter of common observation and knowledge that a hand, arm, foot, or leg incompetent, through injury, for certain employments is competent and useful for other employments. The expressions 'loss' and 'loss of the use' as used in the law, should be given their unrestricted and ordinary meaning. In case at bar the hand, or the use of it, was not lost, provided it could fulfill, in a degree fair and worth considering, in any employment for which the claimant was physically and mentally fitted or adaptive, its normal and natural functions. In case the hand was destroyed by amputation, directly or indirectly caused by the injuries, to such an extent that it could not thus fulfil its natural functions, it was, within the purview of the law, lost. * * * While the loss of a hand necessarily involves the loss of the use of it, the loss of the use of a hand does not involve the actual loss of the hand as a physical member—a distinction the law recognizes and observes. The question here was whether the first or second rate of compensation should be awarded. The uncontradicted evidence established that the hand was not lost, and that the first rate should be awarded."[55]

119 N. E. 1038, 18 N. C. C. A. 792; Cobb v. Library Bureau, 176 N. Y. App. Div. 91, 162 N. Y. S. 291, 18 N. C. C. A. 792; Dutcher v. American Express Co., 183 N. Y. App. Div. 162, 170 N. Y. Supp. 442, 18 N. C. C. A. 795.

55. Grannici v. Zinn, 219 N. Y. 322, 114 N. E. 397, 18 N. C. C. A. 793; Kanzar v. Acorn Mfg. Co., 219 N. Y. 326, 114 N. E. 398, 18 N. C. C. A. 793.

Where an employee lost his left arm by amputation between the elbow and wrist and the whole of the second and third fingers of his right hand and two phalanges of the index and little fingers thereof, the commission awarded compensation for 244 weeks for loss of his left hand, and 116 weeks for the loss of the fingers of his right hand. Later determining that the use of the right hand had been lost, it awarded compensation for total permanent disability. It appears that he had some use of his right hand, could write his name, and dress himself, and therefore, the court held that the award should have been for permanent partial disability, and not for permanent total disability.[56]

Where an employee sustained an injury to a finger and received an award equal in amount to the sum provided for the loss of a finger, and further compensation was sought on the ground that compensation should be awarded under that section of the statute allowing 66⅔ per cent. of the difference between the average wage prior to the injury and the wages claimant was capable of earning subsequent to the injury, the court, in denying the claim, said: "In the case at bar a reasonably liberal construction gives the claimant the benefit of the loss of a third finger, where she still retains a considerable portion of it, which may be of more or less use to her; but to extend this construction to enable her to get more for this useless finger than she would be entitled to if the judgment of the surgeon had called for taking away a trifle more of the finger is absurd, and opens the way to fraud and litigation, where it was the purpose of the statute to eliminate both."[57]

Where an injury to a servant's fingers resulted in temporary total disability, followed by permanent partial disability, an award was made for each under the New Jersey Act and upon certiorari the Supreme Court affirmed the awards, holding that such a finding was proper, even though they amounted to more than the amount allowed for permanent total disability.[58] The acts

56. Corkey v. Island Paper Co., 177 App. Div. 73, 163 N. Y. S. 710, 18 N. C. C. A. 794.

57. Feinman v. Albert Mfg. Co., 170 App. Div. 147, 155 N. Y. S. 909, 18 N. C. C. A. 798.

58. Nitram Co. v. Court of Common Pleas, 84 N. J. L. 243, 11 N. C. C. A. 434, (1913).

usually contain a specific provision guarding against this possibility.

Where an employee lost 4 fingers as the result of an injury, the court on appeal said: "We are of the opinion that under the New York Act it was competent for the Industrial Commission to estimate the proportionate loss of the use of claimant's hand, and that the award is not to be disturbed on this account."[59]

The minimum award under the New Jersey Act is $5 per week. So, where a workman lost one phalange of his finger, and the act provided that the amount payable for such loss should be ½ the amount payable for a finger, the minimum compensation should be $5 per week.[60]

Under the Massachusetts Act a specific indemnity of twelve weeks compensation could not be awarded for the injury to one phalange of a finger, where the phalange was not entirely removed, as, under the act as amended in 1913, the specific indemnity for an injury of such a nature as to make a member incapable of further use, applied only to a whole finger and not to one phalange.[61] Where an employee's thumb; and parts of all the other fingers of his right hand were amputated, but his hand was not rendered permanently incapable of use, he was limited under the Massachusetts Act, to compensation for twenty-five weeks.[62]

The loss of the use of the first phalange as the result of losing the nail and tip of the finger, will justify an award for the loss of the first phalange.[63]

The loss of a thumb, a partial loss of the use of the first finger, and the loss of the use of the fourth finger, entitled a workman to at least the minimum amount of $5 per week compensation for the periods specified in the statute for these specific injuries.[64]

59. Berman v. Reliance Metal Spinning & Stamping Co., 187 App. Div. 816, 175 N. Y. S. 838, (1919), 4 W. C. L. J. 128.

60. Banister v. Kriger, 36 N. J. L. J. 307, 84 N. J. L. 30, 85 Atl. 1027, 3 N. C. C. A. 585; Maziarski v. Geo. A. Ohl & Co., 86 N. J. L. 692, 93 Atl. 110.

61. In re Ethier, 217 Mass. 511, 105 N. E. 376, 5 N. C. C. A. 611.

62. Jakutis' Case, — Mass. —, 130 N. E. 637, (1921).

63. Shayne v. American Cap. Fronts Mfg. Co., 9 N. Y. St. Dep. Rep. 362.

64. Mueller v. Oelkers Mfg. Co., 36 N. J. L. J. 117.

Where a workman lost the ends of the second and third fingers of a hand, from which the thumb and first finger were already missing, the court affirmed a finding of permanent partial disability.[65]

Where an injury results in the loss of the use of an arm through paralysis compensation should be allowed according to the provisions of the statute, which provides for injuries producing partial disability to do work of any reasonable character, and not according to the provisions of a section, which provides, only for injuries not producing disability to do work.[66]

Where the injured employee is still able to bend the finger at the distal joint, and has left practically a third of the bone of the first phalange and part of the nail he is not entitled to compensation for the loss of the first phalange.[67]

In a Michigan case the court said: "The statute nowhere provides for the loss of a part of a phalange in its list of specified injuries and presumed disability arising therefrom. Except as to enumerated specific injuries, the compensation is to be proportionate to the extent of the impairment of the earning capacity in the employment in which he was working at the time of the accident.' Section 11, pt. 2, Compensatiin Law. It is obvious that the award by the Board of Compensation for 30 weeks, which is that allowed by the statute for the loss of an entire phalange, was based upon its determination that claimant had lost the entire use of said phalange. Under our decision, this award is clearly erroneous. Limron v. Blair, 181 Mich. 77, 147 N. W. 546; Hirschkorn v. Fiege Desk Co., 184 Mich. 240, 150 N. W. 851; Cline v. Studebaker Corporation, 155 N. W. 519, L. R. A. 1916C, 1139; Carpenter v. Detroit Forging Co., 157 N. W. 374, the latter case being directly in point.

"The award of the board should have been limited to the period of disability which under the testimony of the claimant was 18 weeks."[68]

65. Seckman v. Monarch Cement Co., 100 Kan. 463, 165 Pac. 278.

66. Garr v. Wyatt Lumber Co.,— La.—, (1920), 85 So. 640, 6 W. C. L. J. 532.

67. Maxwell's Case,—Me.—, (1921), 111 Atl. 849.

68. Packer v. Olds Motor Works,—Mich.—, 162 N. W. 80, A 1 W. C. L. J. 992.

Following the foregoing case it was held that, where the bone of the second phalange of the thumb was removed, leaving a stump with life and feeling, but useless, this did not amount to a total loss of the member.[69]

Where an employee suffered the loss of a thumb and forefinger, an award of 72 per cent of the use of a hand, based upon a table adopted by resolution of the commission fixing the percentage of loss of use of the hand occasioned by specific injuries must be set aside, since the statute has prescribed a scale or loss in case of specific injuries of this class.[70]

§ 411. **Injury to Arm, Hand or Finger.**—Unless expressly provided in the act, to come within the personal injury provisions for loss of a member, there must have been a complete severance of the member, and where it is disabled partially or totally but not severed, compensation for the injury must be determined under the general provisions of the statute.[71] This rule was followed in New York prior to the amendment of its act in 1916. "We think also that, even if there is a permanent loss of the use of the finger, an improper rate of compensation has been adopted. The statute (Consol. Laws. c. 67), by amendment (Laws 1916, c. 622) since the accident provides that:- 'Permanent loss of the use of a hand, arm, foot, leg, eye, thumb, finger, toe or phalange, shall be considered as the equivalent of the loss of such hand, arm, foot, leg, eye, thumb, finger, toe or phalange.' Section 15, subd. 3. Under the statute as it was at the time of the accident a finger was not included in that category. An award has been erroneously made for the equivalent of the loss of the index finger. The case of the claimant falls within another part of the statute (section 15, subd. 3), which provides that 'the compensation shall be 66⅔ per centum

69. Adomites v. Royal Furniture Co,—Mich.—, 162 N. W. 965, A 1 W. C. L. J. 865.

70. Bubniak v. John K. Stewart & Sons, 183 N. Y. S. 812, (1920), 6 W. C. L. J. 577.

71. Norwood v. Lake Bisteneau Oil Co., 145 La. 823, 83 So. 25, 5 W. C. L. J. 76; Northwestern Fuel Co. v. Leipus, 161 Wis. 450, 152 N. W. 856, 9 N. C. C. A. 347; In re Sugg,—180 App. Div. 133, 167 N. Y. Supp 390, 1 W. C. L. J. 257.

of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability,' subject to the qualification that such compensation cannot exceed that for the loss of a finger. Matter of Claim of Feinman v. Albert Manufacturing Co., 170 App. Div. 147, 155 N. Y. Supp. 909."

Where injuries resulted in contraction and inability to extend the second and third fingers, with consequent interference with the functions of the hand and remaining fingers, the award should not be confined to the specified amount for loss of the second and third fingers, under section 15, subdivision 3, of New York Act, but may be awarded under that part of the subdivision regulating other cases and the commissioner should determine the wage earning capacity of the claimant and not base the award alone on actual wages received since the accident.[72]

Where a painter sustained an injury to his hand which resulted in the loss of control over his third and fourth fingers, but did not thereby diminish his earning capacity, it was held that he had not suffered a loss of the hand. The court said: "No case has been cited to us, nor have we found any arising under the Workmen's Compensation Act which holds that the 'loss of use' should be given the full effect of 'loss.' On the other hand, there is approved authority sustaining our conclusion under Workmen's Compensation Acts. Packer v. Olds Motor Works, 195 Mich. 497, 162 N. W. 80; Adomites v. Royal Furniture Co., 196 Mich. 498, 162 N. W. 965; Northwestern Fuel Co. v. Industrial Commission, 161 Wis. 450, 152 N. W. 856, Ann Cas. 1918A, 533, and extended note, the introduction of which is as follows: 'The general rule deducible from the cases cited throughout this note is that unless a workmen's compensation act provides that when a member is so impaired as to be permanently incapable of use compensation shall be awarded as for the "loss" thereof, "loss" of a member is construed to mean loss by severance only.' See also, the definitions in Grammici v. Zinn, 219 N. Y. 322, 114 N. E. 397." The claimant was entitled to compensation only under the provision allow-

72. In re Behrens, 188 App. Div. 66, 176 N. Y. Supp. 28, (1919), 4 W. C. L. J. 282.

ing compensation on the basis of the difference between the earning capacity before and after the accident, and as this was not impaired, claimant was not entitled to compensation, for an injury which does not incapacitate the employee for work, if not one of the enumerated class, deemed to incapacitate, it is not compensable since the statute aims to compensate for loss or earning power and not for injuries which do not incapacitate. [73]

Where two fingers of the claimant's hand were rendered stiff, the court held that the Industrial Board had the right to reopen the agreement between the parties and award additional compensation upon the determination that the injury was permanent.[74]

Where an employee was earning the same pay subsequent to the injury as he had been earning prior to the injury, the court, in holding that his earning capacity had been impaired, said: "It may well be that for a time an injured employee might he able to earn the same wages as before the accident, but, as we read the act, the disability intended thereby is a disability due to loss of a member, or part of a member, or of a function rather than to mere loss of earning power. Even if this were not so, it does not follow that the injured employee had not sustained a distinct loss of earning power in the near or not remote future and for which the award is intended to compensate." [75]

Where an injury to an employee's arm impaired its efficiency to the extent of 75 per cent of the lower arm and 8 per cent of the upper arm, the award was made for 75 per cent of the statutory allowance for the loss of an arm, and it was contended that the award for the amputation of the arm below the elbow should be the same as for the loss of a hand, the court, in holding that the award was not necessarily inconsistent with the statutory provisions, said: "It is conceivable that a maimed forearm may impair the efficiency of the whole arm more than the amputation.

73. In re Merchants Case, 118 Me. 96, (1919), 106 Atl. 117, 3 W. C. L. J. 732, 18 N. C. C. A. 458; Weber v. American Silk Spinning Co., 38 R. I. 309, 95, Atl. 603, 11 N. C. C. A. 436.

74. Enterprise Fence & Foundry Co. v. Majors, — Ind. App. —, 121 N. E. 6, 18 N. C. C. A. 462.

75. De Zeng Standard Co. v. Pressy, 80 N. J. L. 469, 11 N. C. C. A. 428.

We ought not to extend by construction the limitation imposed by statute in the case of amputation." [76]

"In a hearing under the Workmen's Compensation Act to ascertain the compensation to be awarded to an injured employee, where there are permanent injuries to be awarded to an injured employee, where there are permanent injuries to the hand and arm below the elbow, the court should determine the percentage of total disability of the hand and fix the compensation accordingly. Where the same accident results also in permanent partial disability to the arm above the elbow, the court should determine the per centage of total disability of the arm as a whole, including the forearm and hand, and fix the compensation accordingly. It is improper in such a case to divide the injuries into two units, those to the hand, and those to the arm." [77]

Compensation for 22½ weeks, at the minimum, was allowed for a permanent injury to the hand which was not specifically covered by the act.[78]

Where the right hand of an employee was so injured as to be incapable of use, it was urged that an operation would make the arm more useful, but the court held that he was entitled to compensation for the loss of an arm, and was not required to submit to an operation the results of which were highly speculative and uncertain.[79]

The Massachusetts Act provides the specific compensation for a member which has been "so injured as to be permanently incapable of use." So where most of the flexor tendons of a workman's hand had been severed and the hand could not be put to any normal use, it was held that this was such an incapacity as provided for in the statute, and compensation was allowed for the loss of the entire hand.[80]

76. Blackford v. Green, 87 N. J. L. 359, 94 Atl. 401, 9 N. C. C. A. 348, Voorhees v. Stickle, 38 N. J. L. 143.

77. State ex rel. Kennedy v. District Court Clay County, 129 Minn. 91, 151 N. W. 530, 8 N. C. C. A. 478.

78. White v. Lauter Co., 37 N. J. L. J. 175.

79. Floccher v. Fidelity & Deposit Co., 221 Mass. 54, 108 N. E. 1032.

80. In re Meley, 219 Mass. 136, 106 N. E. 559.

An injury resulting in a stiff arm would not entitle a person to compensation for the loss of an arm, but the award must be based upon the amount of loss the injured arm bears to the amount stated in the schedule for the loss of an arm.[81]

An impairment of the use of an arm, not amounting to the loss of an arm, cannot be compensated under the provision specifically providing for the loss of an arm.[82]

Where an employee received an injury to his fingers so stiffening them as to prevent him closing his hand, it was held that he had been partially incapacitated from labor, despite the fact that he remained in the same employment at the same wages.[83]

An injured finger is not lost if it can fulfill its normal and natural functions to a degree fair and worth considering, in any employment for which claimant is fitted or adopted mentally or physically.[84]

Before the New York Commission has jurisdiction to make an award for the "proportionate loss of the use of the hand," instead of allowing for specific injuries, there must be an actual physical loss of more than one finger, or the "permanent loss of the use of a finger," in order to constitute such loss, and the slight injury to three fingers does not constitute "the loss of more than one finger."[85]

Where the physicians disagreed as to the extent of the disability, a finding that the claimant has sustained a 33⅓ per cent loss of the use of his arm was justified since there is no method by which the exact percentage can be determined.[86]

§ 412. **Injury to Leg or Foot.**—Where a workman sustained an injury to his leg which resulted in incapacity for a greater

81. Barbour Flax Spinning Co. v. Hagerty, 85 N. J. L. 407, 89 Atl. 919, 4 N. C. C. A. 586.

82. Northwestern Fuel Co. v. Leipus, 161 Wis. 450, 152 N. W. 856.

83. Gailey v. Peet Bros. Mfg. Co., 98 Kan. 53, 157 Pac. 431.

84. In re Supple, 180 App. Div. 135, 167 N. Y. S. 391, 1 W. C. L. J. 259.

85. Clayton v. Foundation Co., — App. Div. —, (1920), 185 N. Y. 31, 7 W. C. L. J. 223.

86. Johnson v. United States R. R. Admnr., — N. Y. App. Div. —, 185 N. Y. Supp. 338, 7 W. C. L. J. 349.

period than would be covered by the award for the loss of the leg under the Kansas Act, it was held that an award for compensation, in an amount greater than would be justifiable in case of the loss of the leg was proper. The court said: "It may well be that the loss of a leg might, in some instances, work less incapacity for earning wages than an injury thereto; at any rate, the schedule of the section already referred to expressly allows, for the loss of the leg, 50 per cent. of the average weekly wages during 200 weeks, while the same section, paragraph 19, provides that—

'In case of partial disability not covered by schedule the workman shall receive during such period of partial disability not exceeding (8) eight years, 60 per cent. of the difference between the amount he was earning prior to said injury as in this act provided and the amount he is able to earn after such injury.'

"The trial court in following this provision committed no error, for thus the law is written." [87]

Where an employee sustained an injury resulting in permanent impairment of the ankle the court held that compensation should be allowed for the healing period preceding the time when the permanent disability began, even though the amount so awarded might have been a larger sum than he would have been entitled to had he lost the foot. [88]

Where an employee suffered an injury to his foot which was likely to cause flatfoot and difficulty in walking, the commission made an award for the loss of the foot. In holding that this was error the court said, that the statute provides that in case of permanent loss of the use of a member the award should be for loss of the member. In cases of permanent partial disability the award shall be based upon the extent of such disability, it also provides that: "In cases of permanent partial disability due to injury to a member, resulting in less than total loss of such member not otherwise compensated in this schedule, compensation shall be paid at the prescribed rate during that part of the time specified in

87. Close v. Lucky O. K. Mining Co., 105 Kan. 257, (1919), 182 Pac. 392, 4 W. C. L. J. 492.

88. Wis. Ice & Cartage Co. v. Indus. Comm., 167 Wis. 122, 166 N. W. 664, 1 W. C. L. J. 897, 18 N. C. C. A. 453.

this schedule for the total loss of the respective member, which the extent of the injury to the member bears to its total loss." Reversing the judgment the court held that there was not a loss of the foot, nor was there a "permanent loss of the use" thereof, but that there was permanent partial disability "due to an injury to a member, resulting in less than total loss of such member," and that compensation should have been awarded on the basis of 50 per cent of the daily wages of the employee for such part of 125 weeks as the extent of the injury to the foot bore to its total loss. The court said: "It is doubtless a difficult question, on almost any evidence, to determine just how an injury that is not equal to a total loss of a member compares in extent with such a total loss. But the law required that this comparison be made, and that the period during which the payments are to continue be determined therefrom. Clearly much is left to the judgment of the trial court but in finding that the injury in this case was equal to the total loss of the injured member and should be compensated in the same amount as if the foot had been severed, or the use of it completely lost, we think the learned trial court erred."[89]

Under the New Jersey Act no more can be allowed for an injury to an ankle than the stipulated compensation for the loss of a foot. The court said: "The judge found that the injury sustained was tantamount to the loss of a leg, and fixed the compensation on a basis of one-half the wages for 175 weeks. In this we think there was an error. The statute allows for compensation at that rate for the loss of a leg. It allows 50 per cent. of the wages for 124 weeks only for the loss of a foot. It also provides that amputation between the knee and ankle shall be considered as equivalent to the loss of a foot. We think it was erroneous to hold under these provisions that the injury in question was greater than it would be if the leg had been amputated between the knee and the ankle. There is no special provision of the statute fixing compensation in this particular case, but provision is made that in cases not especially provided for the compensation shall bear such relation to the amount stated in the schedule as the dis-

89. State ex rel John Wunder Co. v. District Court Hennepin Co., 136 Minn. 147, 161 N. W. 391, 18 N. C. C. A. 798.

abilities bear to those produced by the injuries named in the schedule. We think that under this provision the compensation cannot exceed 50 per cent. of the wages for 124 weeks, being the amount allowed for the loss of a foot. Whether it should equal that is a matter that ought to be determined by the trial judge. It is said in behalf of the petitioner that the question is purely one of fact and not subject to our review on certiorari, but whether or not under the statute the trial judge should allow more for the injury in this case than the amount which the statute expressly limits him to in the case of an amputation is, we think, a question involving the construction of the statute, and therefore a question of law for us to decide."[90]

In an Indiana Case the court of appeals of that state said: "The award of the Industrial Board was correctly made for the provision of sections 31, 41, and 44 of the Workmen's Compensation Act, of Indiana. Under the provisions of section 31 for specific injuries appellant would have been entitled to compensation for 125 weeks if his foot had been severed at or above the ankle. The facts of this case do not disclose a severance of appellant's foot or any part thereof; consequently it does not fall within the specific provisions of said section, but comes within the general provisions thereof, wherein discretionary powers are given the board in such cases to allow compensation for a period of time not to exceed 200 weeks, and, since it is the duty of such board to weigh conflicting evidence, we cannot say as a matter of law that the Industrial Board abused its discretion in allowing appellant compensation for a period of 93¾ weeks."[91]

A broken leg caused a shortening of the leg, and limited the motion of the great toe, the toe next to it and the motion of the ankle slightly. This was held to amount to 25 per cent of the loss of the leg and compensation was awarded on that basis.[92]

90. Rakiec v. Delaware L. & W. R. Co, — N. J. L. —, 88 Atl. 953, 4 N. C. C. A. 734.

91. Underhill v. Central Hospital for the Insane, — Ind. App. —, 117 N. E. 870, 1 W. C. L. J. 360, 18 N. C. C. A. 467.

92. Kelley v. The Seltzer Bennett Co., 38 N. J. L. J. 336.

A compound fracture of the right ankle which splintered the tibia and fibula stiffened the ankle and shortened the leg was compensated on the basis of 40 per cent of the loss of the foot.[93]

§ 413. **Loss of Leg or Foot.**—Where an injury results in the loss of a portion of the foot the period of compensation must be determined under the provision of the act which provides that "in all other cases of permanent partial disability, including any disfigurement which may impair the future usefulness or opportunities of the injured employee compensation shall be paid when and in the amount determined by the Industrial Board not to exceed 55 per cent. of the average weekly wages for a period of 200 weeks, but the compensation should not be awarded for a longer period than provided in section 31 class "c' " fixing the period of loss for a foot at or above the ankle at 125 weeks, unless the facts warrant the board in finding that such injury and consequent disability were greater than occasioned by the loss of a foot by separation at or above the ankle joint.[94]

The permanent loss of the use of a leg was not shown, where the physicians differed in their opinion concerning the disability and it appeared that the claimant had some use of his leg although he would be unable to continue at his former occupation of house painting. The court said: "The fact that claimant had sustained a compound fracture of the leg, between the ankle and the knee does not create the presumption that he had lost the use of his foot."[95]

"Under the Nebraska Workmen's Compensation Act compensation cannot be awarded for the loss of a toe unless the injury has impaired the earning power of the employee.

"And where it provides for compensation for partial disability at the rate of 50 per cent. of the 'difference between the wages received at the time of the injury and the earning power of the employee thereafter,' the fact that the employee earns higher

93. Brablick v. Radtke, 38 N. J. L. J. 267.

94. In re Cannon, 117 N. E. 658, 64 Ind. App. —, 1 W. C. L. J. 171, 18 N. C. C. A. 468.

95. Modra v. Little, 223 N. Y. 452, 119 N. E. 853, 18 N. C. C. A. 789, 2 W. C. L. J. 534.

wages after than before the injury will not deprive him of compensation to which he is entitled, where he receives higher wages because he has by education and training fitted himself for more remunerative employment." [96]

Prior to the 1919 amendment of the Main Act the total loss of a foot could not be predicated upon the loss of a portion of the foot where the heel is left in a condition so it could be used if supported by a proper mechanical device.[97]

Where an employee sustained an injury which resulted in the loss of the toe of one foot and the commission allowed compensation equal in amount to that allowed for the loss of a foot, an additional award could not be made for the loss of the foot at a later period, since the employee had, though erroneously, received the maximum amount allowable for the loss of a foot on the previous award.[98]

Where an injury necessitated the amputation of a foot at 10 inches above the ankle joint, compensation should be awarded for the loss of the leg, where no distinction is made by the statute between the loss of a part or the whole of a leg. [99]

§ 414. **Loss of, or Impairment of Hearing.**—Where claimant was injured in a fall of rock in a mine, causing a fracture of the base of his skull, dizziness, headache, and general disability, the commission found that as a result of the injury, he lost 20 per cent of the hearing of both ears, 45 per cent of the use of the left eye, and had suffered serious facial disfigurement, incapacitating him for work at his employment, the court affirming the judgment said: "Upon these facts he was adjudged to have suffered a loss of 25 per cent of his earning capacity, and payment was ordered accordingly, with the right to have payment reduced at any time upon proof of an improvement in his physical condition. So far as the insurer is concerned, the findings and award could not

96. Epsten v. Hancock Epsten Co., 101 Neb. 442, 163 N. W. 767, 15 N. C. C. A. 1067.

97. McLean's Case, — Maine —, 111 Atl. 383, 6 W. C. L. J. 681.

98. Bowne v. Stamford Rolling Mills Co., — Conn. —, (1920), 111 Atl. 215, 6 W. C. L. J. 515.

99. Payne v. Indus. Comm., — Ill. —, (1921), 129 N. E. 830.

well have been made more equitable, and were and are clearly within the letter and spirit of the compensation act."[11]

Where an employee suffered from impairment of his hearing as the result of a blow upon the head, which also caused total temporary disability the board awarded $48.75 for total disability and also held that he was entitled to a permanent partial disability award for the impairment of his hearing, affirming the judgment the court said: "At the time of the accident, plaintiff was employed in one of the packing houses belonging to the defendant. From that date until the trial he had not been employed. It is said in plaintiff's brief, and not controverted, that because of his impaired hearing he could not return to his former employment. It is a matter of common knowledge, of which we think we may take judicial notice, that, other things being equal, the men without physical defects will find employment more readily than a man who is physically unsound. If his ability to obtain employment in any of the great industrial enterprises of the country is impaired, it necessarily follows that he will be compelled to find employment in the less desirable occupations and at a less remunerative wage. It is well settled that prospective damages on account of diminution of earning capacity in the future is a proper element of damage, and proof of previous physical condition and ability to labor before the accident and ability to labor after the accident is deemed sufficient to enable a jury to fix the pecuniary damage."[2]

Since the New York Compensation Act does not compensate for injuries which do not impair the employee's earning capacity, the loss of an ear, due to a horse bite, not coming within the schedule of compensable injuries, is not in the absence of a showing of impaired efficiency, compensable under the Workmen's Compensation Act nor included within it, and the employee's remedy is at law.[3]

1. Employers' Mutual Ins. Co. v. Indus. Comm., 65 Colo. 284, 176 Pac. 314, 18 N. C. C. A. 457.

2. Stoica v. Swift & Co., 100 Neb. 434, 160 N. W. 964, 18 N. C. C. A. 457.

3. Shinnick v. Clover Farmer Co., 169 App. Div. 236, 154 N. Y. S. 423, 9 N. C. C. A. 342 (1915); Gibson v. Bellingham & Northern Ry. Co., 213 Fed. 488, 9 N. C. C. A. 343.

§ 415. **Injury to Nose.**—Where a workman suffered an injury to his nose as the result of a blow from a crowbar which broke the bone, closing the left nostril and impairing the circulation of air through the right nostril and also impairing the sight of one eye, compensation was allowed for permanent partial disability of 25 per cent of the loss of the eye and also compensation for 60 weeks for the injury to the nose.[4]

Temporary Partial Disability.

§ 416. **In General.**—Temporary partial disability must be determined from the facts of each particular case. In general it may be said to exist when the employee has been partly incapacitated for work for a limited time, after which regular work may be resumed. This disability may be original or result from any of the other degrees of disability. As for example where a carpenter's foreman is injured in the course of his employment and is unable as a result of the accident to use tools and work with those under him.[5]

Where an employee recovered compensation under the Kansas Act for an injury resulting in the permanent loss of an eye and in addition suffered partial disability from paralysis it was contended that additional compensation could not be recovered for the disability resulting from the paralysis, the court in overruling this contention said: "The subject of partial disability of this character is covered by paragraph 19 of division (c). The court is of the opinion paragraph 19 is not restricted by the provisions of paragraph 23. Paragraph 23 clearly means that the compensation allowed for specific injuries is in lieu of all other compensation for those injuries. The Legislature evidently believed the loss of a specific member or organ deserved the compensation stated, whatever else occurred. If, however, additional injury should increase the workmen's partial disability, either permanently or temporarily, he should receive additional compensation."[6]

4. Dubinski v. Eureka Flint & Spar Co., 38 N. J. L. J. 272.
5. Gordon v. Evans, 1 Cal. I. A. C. Dec. 94.
6. Stefan v. Red Star Mill & Elevator Co., — Kan. —, (1920), 187 Pac. 861, 5 W. C. L. J. 695.

"In an action by a workman to recover compensation under Kansas Laws 1911, c. 218, as amended by Laws 1913, c. 216, where there was evidence tending to show that as a result of the injury plaintiff was less able to perform his work as a car repairer, and the jury made a finding that he was partially incapacitated and awarded him the minimum compensation of $3 a week for the period which they found his partial incapacity would probably continue, it was held that the defendant was not entitled to judgment, on the special findings, although the findings show that within a few months after plaintiff received his injury he obtained employment elsewhere in the same kind of work, and had been earning almost double the amount of his average earnings at the time of his injury for this must be regarded as accounted for by unusual conditions of which the courts will not decline to take notice, and which have resulted in a general increase in the wages paid to laborers."[7]

Where the evidence showed that the claimant was partially disabled for a period of 16 weeks following a period of total disability for a period of 6 weeks an award of $5 per week for 6 weeks for total disability and $84 in addition for the period of partial disability was upheld.[8]

Where an employee, during the period of partial disability earned more than he had been earning prior to the injury, compensation for partial disability was denied under the Indiana Act, which provides that during partial disability the employee shall receive one-half of the difference between his "average weekly wages" and the average weekly wages subsequent to the injury, but such wages shall not be considered to be more than $24.00. The court said: "The apparent confusion arises upon the construction of the phrase 'average weekly wages,' as used in section 30, but when this section is read in connection with section 40, in which the meaning of the phrase is fixed by the legislature,

7. Hood v. American Refrigerator Transit Co., — Kan. —, (1920), 186 Pac. 977, 5 W. C. L. J. 524; Dennis v. Cafferty, — Kan. —, 163 Pac. 461, A 1 W. C. L. J. 605.

8. Jacobs v. Hamilton Coal & Mercantile Co., 105 Kan. 234, (1919), 182 Pac. 410, 4 W. C. L. J. 496.

it is evident that the former could have no application where the facts are as above stated. In other words, section 30 is applicable only where there is a difference between the wages actually received by the injured employee after the injury and the 'average weekly wages' received by him before the injury, which in no case can be computed at more than $24 or less than $10. These limitations placed upon the otherwise broad scope of the act is but another indication that the legislature intended the act as provisional rather than compensatory, and further to refrain from putting a premium on disabled employees. The statement of facts shows that the injured employee is receiving $25 per week, and will continue to receive that amount during the full period of his partial disability, and the provisions of the statute do not authorize any additional payment.''[9]

Compensation may be allowed for temporary partial disability and at the same time for permanent partial disability where they result from different injuries.[10]

The question of duration of incapacity is one of fact to be established as other facts are established and on appeal to be considered as other questions of fact.[11]

§ 417. **Injury to Arm, Hand or Finger.**—''Where it appears, and the evidence supports the conclusion of the board member, that the employee notwithstanding the injury had an earning capacity in the labor market of a weekly wage of $3, if 'he did not have the laudable desire of continuing at school.' It follows that his earning capacity although partially impaired did not amount to a total loss of wage earning power, and he was properly awarded compensation at the rate of $2.67 a week, being two-thirds of the difference between his former weekly wages of $7 and $3, the amount he was able to earn at the date of the second hearing. Sullivan's Case, 218 Mass. 141, 105 N. E. 463, L. R. A.

9. In re Dove, 64 Ind. App. —, 117 N. E. 210, 15 N. C. C. A. 1067.

10. Slago Coal Co. v. Indus. Comm., — Ill. —, (1920), 127 N. E. 751, 6 W. C. L. J. 292.

11. Stephenson v. Indus. Comm., — Okla. —, (1920), 192 Pac. 580, 6 W. C. L. J. 711.

1916A, 378; Duprey's Case, 219 Mass. 189, 106 N. E. 686; Lacione's Case, 227 Mass. 269, 116 N. E. 485."[12]

Where a common laborer, who used both hands at his work, sustained an injury to one hand so as to preclude him from working at the same work, it was contended that he was entitled to full compensation for total temporary disability, but it was held in the lower court that the claimant was not wholly disabled and "the award must stand unless, as claimant contends one who is a common laborer, and is disabled while doing some particular labor requiring the use of both of his hands and arms, is totally disabled if on account of an injury he cannot perform the same labor or labor which requires the use of both arms and hand, but can perform other common labor. We are unable to make the required distinction, being of opinion that the work of one engaged in what is ordinarily described as common labor is an employment within the meaning of the act. The act does not classify persons employed at labor, but it does recognize that there are different kinds of employment. The act was intended to affect and apply to existing conditions, one of which generally recognized, is that persons are employed as common laborers—that the employment of certain wage-earners is, and is known as, common labor and where he could do other work with one hand his disability was partial."[13]

Where an award was made for temporary disability resulting from an injury to an employee's arm it was urged that the allowance for temporary disability was unauthorized because during the period for which the allowance was made, the defendant was able to work and earn wages, and therefore there could be no temporary disability. "In other words, the claim is that the temporary disability must be total to entitle a workman to any compensation under the New Jersey statute (P. L. 1911, p. 134). This is not a proper construction of the statute, for section 2, paragraph 11 (a), as amended in 1913, P. L. 302, provides 'for injury producing temporary disability,' and this does not require that a temporary disability

12. Barry's Case, —Mass. —, (1920), 126 N. E. 894, 6 W. C. L. J. 57.

13. Miller v. Fair & Sons et al., 206 Mich. 360, (1919), 171 N. W. 380, 3 W. C. L. J. 752.

must be total, but provides for any disability of a temporary character, which to any degree impairs the earning capacity of the injured person by depriving him of the use of physical functions existing before the accident, and in this case compensation for the injury to the arm was limited to the continuance of the temporary disability. The liability attaches when the accident happens, and it can only be discharged in the manner provided for in the statute."[14]

PERMANENT TOTAL.

§ 418. **In General.**—Permanent total disability is that condition which is deemed to incapacitate the employee from all work for all time, either actually or by direct statutory provision.

An employee may be said to be totally incapacitated when he is disqualified from pursuing the usual tasks of a workman in such a way as to enable him to procure and retain employment. The fact that he is not absolutely disabled for the performance of any kind of labor is not a prerequisite to a finding of total incapacity. The fact that an employee has an income from a business at which he performs no labor is immaterial.[15]

In may consist of inability to secure employment because of the injury, although the employee would be able to do work if he could secure it.[16]

The acts of most states specify certain injuries that are conclusively presumed to constitute permanent total disability.

Most of the acts include within this class the loss of both legs, both arms, or one arm and one foot, both eyes, complete paralysis of both arms, or of both legs, or one arm and one leg, and injuries causing incurable insanity.

The period of compensation for total disability varies under the different acts, about two-fifths of the acts provide that the payments

14. International Motor Co. v. Purcell, 91 N. J. L. 707, 103 Atl. 860, 2 W. C. L. J. 528, 18 N. C. C. A. 448.

15. Moore v. Peet Bros. Mfg. Co., 99 Kan. 443, 162 Pac. 295.

16. Lacione's Case, 227 Mass. 269, 116 N. E. 485, 18 N. C. C. A. 856; In re Sullivan, 218 Mass. 141, 105 N. E. 463, 5 N. C. C. A. 735; Duprey v. Maryland Casualty Co., 219 Mass. 189, 106 N. E. 686, 11 N. C. C. A. 54.

continue during life, while others limit both the time and the amount for which the employer is to be held liable.

Where an employee's arm was so seriously fractured that it created a total disability, which would be permanent unless the arm be amputated, the court in holding untenable the contention that the award cannot exceed that authorized for the loss of an arm, said: "The original injury was a very bad fracture of the arm, which was compound, and became infected and discharged pus for a long period. Amputation was seriously considered, but the arm was saved. There was, however, a poor recovery, and the patient had several abscesses, and at the time of the hearing was suffering, as the court found, with a severe neuritis caused perhaps by minor nerves being involved with the callous of the fracture, which, in the opinion of his physician, made him totally unfit for work, and there was evidence to support the finding that this condition would continue indefinitely unless the arm were amputated. Prosecutor's claim is that the award cannot exceed that authorized for the loss of an arm, but to this we do not agree. Cases are readily conceivable in which total and permanent disability exists without the loss of or injury to any specific member. If the physical conditions in the present case as the court found them to exist at the time of the hearing created a total disability which was permanent unless the arm were amputated (and we think the evidence justified a finding of such a condition), the case of Feldman v. Braunstein, 87 N. J. Law, 20, 93 Atl. 679, controls, Petitioner is not required to undergo a serious operation such as amputation of the arm at the shoulder." [17]

Where an employee, who had previously lost an arm, suffered an injury resulting in the loss of a leg it, was contended that it was error to hold the employer liable for a total permanent disability. The court, in passing on this question, said: "The basis of this contention is that the loss of one leg does not constitute total per manent disability. Defendant in error, Williams, contends, on the other hand, that the loss of his left leg, combined with the previous loss of his left arm, constitutes total permanent disability

17. Simpson v. New Jersey Stone & Tile Co., 93 N. J. L. 250, (1919), 107 Atl. 36, 4 W. C. L. J. 425.

and that judgment of the circuit court is correct. This precise question has arisen before in this state. It has arisen in other jurisdictions under compensation acts similar to our Act. In Massachusetts and New York it has been held that under such circumstances the disability occasioned is total and permanent, In re Branconnier, 223 Mass. 273, 111 N. E. 792; Schwab v. Emporium Forestry Co., 216 N. Y. 712, 111 N. E. 1099. The Michigan court takes the contrary view. Weaver v. Maxwell Motor Co., 186 Mich. 588, 152 N. W. 993, L. R. A. 1916B, 1276 Ann. Cas. 1917E, 238. Paragraph (e) of section 8 of the Workmen's Compensation Act (Hurd's Rev. St. 1917, c. 48, Sec. 133) provides that the loss of both hands or both arms, both feet, both legs, both eyes, or any two of them, shall constitute total and permanent disability. We are disposed to follow the reasoning of the Massachussetts court construing a statute quite similar to ours, and hold that this act applies where the loss of one of the members mentioned occurred previous to the employment, and the loss of the other occurred as the result of an injury arising out of and in the course of the employment. This, in our opinion, is the fair intent and meaning of the act. When Williams was employed by plaintiff in error, he had lost his left arm, and his capacity for work was to that extent impaired. He was employed to do work which could be performed by a man having but one arm, and he was paid upon that basis. By the loss of his leg such capacity as he had for work was entirely destroyed, and under the provisions of the act he was entitled to compensation for total permanent disability. Such a construction of the act works no hardship upon plaintiff in error. Williams was employed and paid as a man of limited capacity, and the compensation which plaintiff in error is required to pay is based upon the wages it was paying him as a man of limited capacity."[18]

Where an employee entered upon a contract of employment with the vision of one eye destroyed, and by an injury in the course of his employment lost the vision of the second eye, the court in holding that he was entitled to compensation for perma-

18. Wabash Ry. Co. v. Indus. Comm., 286 Ill. 194, 121 N. E. 569, 3 W. C. L. J. 435.

nent total disability said: "In Branconnier's Case, 223 Mass. 273, 111 N. E. 792, an employee had lost an eye in 1910, and in 1915 he lost the sight of his remaining eye by an accident arising out of and in the course of his employment. The question presented was whether there was error in refusing to rule as matter of law that the total incapacity of the employee could not be attributed to the injury of 1915. The provisions of the Massachusetts act were similar to the provisions of our own act as hereinbefore set forth. The court said: 'The denial of this request was right. The employee, when he entered the service of the subscriber, had that degree of capacity which enabled him to do the work for which he was hired. That was his capacity. It was impaired capacity as compared with the normal capacity of a healthy man in the possession of all his faculties. But nevertheless it was the employee's capacity. It enabled him to earn the wages which he received. He became an "employee" under the act, and thereby entitled to all the benefits conferred upon those coming within that description. The act affords a fixed compensation for a limited time, "while the incapacity for work resulting from the injury is total." Mass. St. 1911, c. 751, pt. 2, sec. 9. It establishes no other standard. It fixes no method for dividing the effect of the injury and attributing a part of it to the employment and another part to some pre-existing condition, and it gives no indication, that the Legislature intended any such division. The total capacity of this employee was not so great as it would have been if he had, had two sound eyes. His total capacity was thus only a part of that of the normal man. But that capacity, which was all he had, has been transformed into a total incapacity by reason of the injury. That result has come to him entirely through the injury.' In the present case we are of the opinion that a condition of total incapacity resulted to the employee from the injury to his left eye, and we adopt the quotation from the opinion in Branconnier's Case, supra, as a clear and succinct statement of the grounds of our own opinion. See also, Schwab v. Emporium Forestry Co., 167 App. Div. 614, 153 N. Y. Supp. 234; Lee v. William Baird & Co., Ltd., 45 Sc. L. R. 717; and Duffy's Case, 226 Mass. 131, 134, 115 N. E. 248.

"The opposite view is presented in Weaver v. Maxwell Motor Co., 186 Mich. 588, 152 N. W. 993, L. R. A. 1916B, 1276, Ann. Cas. 1917E, 238, where the statute is apparently similar to our own. See also, Rouner v. Columbia Steel Co., 2 Cal. I. A. C. Dec. 233." But where the statute provides compensation for specified injuries in addition to the compensation otherwise provided for in the act, that is, in this case, permanent total disability, and this statute provides 100 weeks for the irrecovable loss of the sight of both eyes and 50 weeks for the loss of one eye, there could be no question concerning the specified injury in this case, and additional compensation for 50 weeks is all that could be recovered.[19]

Where an employee died from injuries received under conditions making the Workmen's Compensation Act applicable and left surviving her no person entitled to compensation, it was contended that the following provision of the New York Act, requiring the payment to the state treasurer, is not authorized by the Constitution of the state, in that it requires the insurance carrier to pay compensation to another than employees of the employer insured by it: "If an employee who has previously incurred permanent partial disability through the loss of one hand, one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member or organ, he shall be paid, in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed period of weeks, special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: The insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of one hundred dollars. The state treasurer shall be the custodian of this special fund, and the

19. In re J. & P. Coats, 41 R. I. 289, 103 Atl. 833, 2 W. C. L. J. 557; Branconnier's Case, 223 Mass. 273, 111 N. E. 792.

commission shall direct the distribution thereof." Section 15, subd. 7, added by Laws 1916, c. 622. "In November, 1915, we decided that a claimant, who became an employee under the act, having theretofore lost a hand, became entitled, upon the loss of the remaining hand while such employee, to the compensation for permanent total disability, and not to the lesser compensation for permanent partial disability Matter of claim of Schwab v. Emporiuom F. Co., 216 N. Y. 712, 111 N. E. 1099. Our decision related to a claim arising in July, 1914, and affirmed the decision of the Appellate Division rendered May 5, 1915. Matter of Claim of Schwab v. Emporium F. Co., 167 App. Div. 614, 153 N. Y. Supp. 234. Manifestly the law was a hindrance to those who, having lost a hand or other member, sought to become employees under the act, because the loss of the remaining member subjected the employer to the payment of a compensation substantially greater than it would in case the employee had the two members. After the decision of the Appellate Division, the Legislature by an amendment to subdivision 6 of section 15, enacted that: 'An employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability.' Laws 1915, c. 615.

"The provisions of section 15, were supplemented in 1916, by the addition of subdivision 7, which we have already quoted. The evident and clear purpose of the subdivision was to remove a condition, as between employers and partially disabled employees, inconsonant with the spirit of the act and, perhaps, unjust through the creation of a state fund contributed to by the insurance carriers and, as the permanent total disability arose, accessible to any member of the entire prescribed class of employees so disabled. Its provisions are within the letter and spirit of the Constitution."[20]

Where a pile driver received injuries of so serious a nature as to permanently incapacitate him from pursuing the employ-

20. State Indus. Comm. v. Newman et al., 222 N. Y. 363, 118 N. E. 794, 1 W. C L. J. 849.

ment he was engaged in prior to his injury, the court said: "The last sentence of section 11, pt. 2, of the Workmen's Compensation Act, being section 5441, compiled laws of 1915, is as follows:

'The weekly loss in wages referred to in this act shall consist of such per centage of the average weekly earnings of the injured employee, computed according to the provisions of this section, as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury.'

"It is the contention of the respondent and appellant that the board erred in holding that the claimant was permanently disabled because of the fact that he was unable to engage in the specific and identical work that he was engaged in at the time of his injury, and to give the law this construction would result in great inequity. It is also the contention of counsel for claimant that the question here presented has been squarely ruled upon in the case of Foley v. Detroit United Ry., 190 Mich. 507, at page 515, 157 N. W. 45, at page 48. Mr. Justice Steere, speaking for the court, in referring to the language of section 11, above set forth, said:

'The language of this last provision is plain, and has but one obvious meaning, designating as the test capacity to earn in the same employment in which the employee was injured. That under this rule instances may arise where it works inequitably does not authorize the court to read exceptions into it or modify its plain language defining the basis for estimating incapacity, which at best can only be approximated. If the method ought to be changed or exceptional cases provided for, the remedy rests with the Legislature.' * * *

"The serious character of the injuries here undisputed clearly shows that the claimant is physically incapacitated from pursuing the employment in which he was engaged at the time of this accident, and that therefore the case comes, as contended,

squarely within the ruling of the Foley case, supra."[21] But a contrary decision was reached in the case of a common laborer, who, although unable to perform the exact duties he had been performing prior to the injury, was able to perform other common labor.[22]

In proceedings under the Indiana Workmen's Compensation Act the court has held that, "The act specified a rule of admeasurement of compensation 'where the injury causes total disability,' which includes death."[23]

An employee suffered a severe injury to his right hand, the middle and ring fingers being impaired, the index finger amputated, but the thumb and little finger being normal. The board made an award, for total disability, based apparently in part on the fact that the employee had little knowledge of English and could not understand orders. The injury was wholly to his right hand and subsequent to the injury he returned to work, doing light jobs for about two months. In reversing the award, the court said: "Assuming that on this evidence the board might have awarded compensation for a partial loss of the employee's capacity to earn wages, in our opinion it did not warrant their finding that he was 'totally incapacitated for work and unable to earn any wages; that such total incapacity will continue for an indeterminate period.' It is common knowledge that men who have entirely lost a hand are able to obtain work and earn wages. That the employee in this case might have done so is shown by the fact that he worked at substantially his old work during November and December, and apparently did not suffer therefrom. Inability to obtain work resulting directly from his injury would be an 'incapacity for work,' within the meaning of the Workmen's Compensation Act. But this record does not disclose that any effort whatever was made by the employee to obtain work during the four months preceding the hearing. * * * As the

21. Jameson v. W. S. Newhall Co., 200 Mich. 514, 166 N. W. 834, 1 W. C. L. J. 1022, 18 N. C. C. A. 855.

22. Miller v. Fair & Sons, 206 Mich. 360, 171 N. W. 380; Leitz v. Labadie Ice Co., — Mich. —, (1920), 179 N. W. 291, 6 W. C. L. J. 691.

23. In re Bowers, 64 Ind. App. —, 116 N. E. 842, 18 N. C. C. A. 856.

evidence does not show a total inability to perform work, or secure work to do, the finding of a total loss of wage-earning ability by the employee at the time of the hearing, and for the four months preceding, was not warranted by the evidence."[24]

The fact that an employee is capable of performing other work than the kind he was engaged in prior to the injury, will preclude a finding of total permanent incapacity.[25]

An injury necessitating the removal of one kidney was held to amount to 75 per cent of permanent total disability, and compensation was awarded on that basis.[26]

Where the act provides that compensation shall be paid for a period of 400 weeks, beginning on the eighth day after the injury, if the total and permanent incapacity continues for a period of 400 weeks, an award for 401 weeks is erroneous.[27]

§ 419. **Loss of or Injury to Eye.**—Loss of an employee's only eye constitutes a "total" permanent disability subject to an allowance for not more than 400 weeks and is not a "partial" permanent disability subject to an allowance of 100 weeks under the Iowa Compensation Act. "The rationale of these Employers (Liability Acts is that the employment in which the workman has been disabled owes him a living, and it stands to reason that the workman is as totally disabled from work by the loss of one eye as by the loss of two, if he had but one, and by the impairment of the sight as much as by the loss of it, if the impairment be to such a degree as to disable entirely from work. In speaking of the workman being only partially disabled by the loss of one eye, one arm, or one foot, this Employer's Liability Act has reference evidently to the normal man, having both eyes, arms, or feet."[28]

24. Laclone's Case, 227 Mass. 269, 116 N. E. 485, 18 N. C. C. A. 856.

25. Duprey v. Maryland Cas. Co., 219 Mass. 189, 106 N. E. 686, 11 N. C. C. A. 54.

26. O'Connor v. Babcock & Wilcox Co., 37 N. J. L. 275.

27. Texas Employer's Ass'n v. Downing, — Tex. Civ. App. —, 218 S. W. 112, 5 W. C. L. J. 582.

28. Jennings v. Mason City Sewer Pipe Co., — Iowa —, (1919), 174 N. W. 785, 5 W. C. L. J. 233; Brooks v. Peerless Oil Co. Inc., 146 La.

The Minnesota Act limits the liability of an employer for accidental injury of an employee, where such employee had prior to entering the service suffered an injury resulting in permanent partial disability, to the compensation provided for permanent partial disability, even though both injuries result in permanent total disability. So where an employee having lost one eye in prior employment and during another employment suffered an injury to the remaining eye which totally destroyed its sight and rendered him totally blind, he was entitled to compensation for only permanent partial disability. The court said: "The section provides: The language of the statute is clear and unambiguous, and clearly was intended to limit the liability of the employer to compensation commensurate with the injury suffered by the employee while in his service, and to relieve him from the consequences of injuries previously sustained even though both resulted in permanent total disability. From the viewpoint of the Legislature, and the fact that the liability created is founded upon no wrong of the employer, it would seem fairly clear that this limitation upon the liability was deliberately made, and founded in justice and fairness. The employer accepts in his service a disabled employee, knowing of the disability and with the knowledge that under the compensation statute he is liable for accidental injuries to such employee while engaged in his service; but to couple the prior disability with one suffered while in his service and make the employer liable for both, would seem a hardship the Legislature intended to avoid. At least we think the language of the statute clearly manifests that intention. The statute is too plain to admit of any other view, and there is no room for judicial construction. While it is true that the combined injuries result in total disability, the statute declares that as to the last employer it shall be treated as a partial disability. That the Legislature had the right to so provide cannot well be questioned. And, though the statute is remedial in the broadest sense of the term, to be liberally construed, the court is without power or authority to change the plain language thereof by construing it to mean the reverse of what is clearly stated therein. * * * We are im-

pressed that to sustain relator's contention would tend only to embarrass partially disabled laborers from securing employment, for employers would be reluctant to engage them if there was a contingent liability to make compensation for injuries previously suffered by them. However, the question of the wisdom and propriety of this provision of the law is not before us. We give effect to it as expressed therein, and, if it is deemed harsh and inequitable, the remedy is with the Legislature."[29]

In a Michigan case on all fours with the above case the court arrived at the same result but by a different course of reasoning, though the language of the statute was not indentical, with the wording of the Minnesota statute. In construing the Michigan statute the court said: "The compensation fixed in section 9, must be based upon the fact that the total incapacity for work resulted from the injury. Section 10 deals with the partial incapacity for work resulting from the injury, and fixes the compensation, and then proceeds: 'For the loss of an eye fifty per centum,' etc. 'The loss * * * of both eyes * * * shall constitute total and permanent disability.' In the instant case the loss of the first eye was a partial disability for which, if our workmen's compensation law had been in existence, the then employer would have been liable, and for which disability the present employer was in no degree the cause. The loss of the second eye, standing by itself, was also a partial disability, and of itself did not occasion the total disability. It required that, in addition to the results of the disability occasioned by the accident of seven years ago, there should be added the result of the partial disability of the recent accident to produce the total disability. The absence of either accident would have left the claimant partially incapacitated. We think it clear the total incapacity cannot be en-

383, (1920), 83 So. 663, 5 W. C. L. J. 701; In re Branconnier, 223 Mass 273, 111 N. E. 792; Fair v. Hartford Rubber Works, — Conn. —, (1920), 111 Atl. 193, 6 W. C. L. J. 521.

29. State ex rel. Garwin v. District Court, 129 Minn. 156, 151 N. W. 910, 8 N. C. C. A. 1052.

tirely attributed to the last accident. It follows that the compensation should be based upon partial incapacity "[30]

Since an award is to be based upon the proportion of disability to normal disability, regardless of the fact that there was a previous partial impairment of normal ability, a person of impaired vision who was rendered practically blind except enough vision to recognize a form without being capable of distinguishing its outlines is blind within the meaning of the act and entitled to compensation on that basis. "It clearly appears from the record that the commission was of the opinion that the amount of compensation is to be determined by ascertaining how much an injury contributes to a disability. That is, it is assumed that, if a claimant was partially disabled prior to the injury which forms the basis of his claim, and because of the injury he be found totally disabled, he is not to receive the compensation fixed for disability, because it was not all due to the injury. To illustrate: If claimant before the injury had only one-half of normal vision, and lost one-half of that, he would be entitled to one-quarter of the compensation allowed for total blindness. It is hardly necessary to say that such is not a correct construction of the law. Hills v. Oval Dish Co., 191 Mich. 411, 158 N. W. 314; Duprey v. Maryland Casualty Co., 219 Mass. 189, 106 N. E. 686; and Hartz v. Hartford Faience Co., 90 Conn. 539, 97 Atl. 1020."[31]

Where a ship painter sustained an injury to his eye rendering him incapable of working on a ladder he was awarded compensation for permanent total incapacity under the British Act.[32]

A sewer mason sustained an injury whereby he lost all the sight of the right eye and had only 5 per cent vision of the left with the aid of glasses. The sight of both eyes was good before the accident. The trial court awarded compensation for permanent total disability. Affirming the award the court said: "What

30. Weaver v. Maxwell Motor Co., 186 Mich. 588, 152 N. W. 993, 11 N. C. C. A. 434. Rev'g a prior decision in the same case 8 N. C. C. A. 1055.

31. Indust. Comm. v. Johnson, 64 Colo. 461, 172 Pac. 422, 2 W. C. L. J. 43.

32. James v. Morday, Carner & Co., (1913), 6 B. W. C. C. 680.

is permanent total disability is largely a question of fact, and must depend upon the circumstances of each particular case. The statute itself is highly remedial in its nature. It should be liberally construed and liberally applied to accomplish the beneficial purposes intended and courts should guard against a narrow construction. * * * In this case the fact that a dim vision still existed in one eye is not controlling. All the facts should be taken into consideration."[33]

"The statute (Workmen's Compensation Law, Section 3, subd. 7) defines 'injury' and 'personal injury' to mean only 'accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom.' To constitute an injury resulting in total disability by reason of the loss of eyesight, it must be shown that the eyesight was destroyed by the injury, or that the injury produced 'such disease or infection' as resulted in the loss of the eyesight; the injury must be an accidental injury, 'and such disease or infection as may naturally and unavoidably result therefrom.' An injury which does not naturally and unavoidably produce disease or infection cannot be compensated under the law, except to the extent of the actual injuries. The insurance carrier is liable for the compensation due for the breaking of the tibia, and it may be that it would be liable to compensate the claimant for the disability, or partial disability, arising out of such injury during its continuance, though this should be prolonged beyond the ordinary period by reason of the pre-existing syphilitic condition of the claimant; but where, as here, it is found that the claimant was the victim of a disease, which all the witnesses agree was the cause of the loss of eyesight, and the most that is suggested is that the disease may have been aggravated by the accident, the case is not within the statute, in so far as it relates to the loss of eyesight. The disease, which the Commission finds existed prior to the accident, did not 'naturally and unavoidably result' from the accident; it was there with all

33. State ex rel. Casualty Co. of America v. District Court Blue Earth Co., 133 Minn. 439, 158 N. W. 700, 18 N. C. C. A. 857.

the potentiality of destruction to the eyesight when this accident occurred, and if we assume that the disease was aggravated by the accident, that it developed more rapidly than would otherwise have been the case, still the disease or infection was not the result of the accident, and it is only resulting disease or infection which is provided for by the law. The evidence before the Commission is undisputed that this disease had resulted in 'an atrophy or degeneration of the optic nerve.' and that 'such a condition is in consequence of a specific constitutional infection and is permanent with a tendency toward progression;' that the claimant had developed the symptoms of locomotor ataxia, and that the atrophy of the optic nerve predated the injury, and the only inference from the testimony is that the claimant was so far advanced in the disease that it was only a matter of a comparatively short time when he must have reached the results which now prevail, though no accident had happened. There is some slight testimony to the effect that the disease might have been aggravated or accelerated by reason of the degeneration of the tissues, lessening the claimant's power of resistance; but this does not tend to bring the case within the letter or the spirit of the statute, for no one has ever suggested that the results of 'specific constitutional infection,' which in the present case are conceded to be congenital syphilis, constituted a legitimate charge upon the industrial life of the state. We are clearly of the opinion that the facts found by the Commission, many of which were not in issue, do not give rise to the conclusion of law that this case, as here presented, comes within the statute. That the claimant may be entitled to further compensation upon his claim for the spiral fracture of the right tibia, which was the full measure of his demand in the first instance, may be conceded, and this though the injury may have been prolonged in its results because of the degeneracy due to syphilis; but that the State Industrial Commission has no jurisdiction to award compensation for a permanent total disability due to loss of eyesight, where

such loss cannot by any possibility be traced to the accident, and where no claim for such loss of eyesight was made, is certain."[34]

Where an employee who was suffering from a disease of the eyes, lost the sight of one eye as the result of an accident, and thereafter lost the sight of the other eye, due to atrophy, it was held that he was entitled to an award for the loss of one eye only and not for permanent total disability.[35]

§ 420. **Loss of or Injury to Arm, Hand or Finger.**—Where the compensation Act schedules compensation for the loss of certain members, an injured servant's loss of four fingers together with practically all of the palm or fleshy part of the hand which incapacitated him for work at the employment in which he was engaged at the time of the accident, entitled him to compensation for 100 weeks for the loss of the four fingers, with the provision that if at the end of 100 weeks he was totally disabled in his employment, he should be paid compensation at the same rate during such total disability up to the limit scheduled for the loss of one hand.[36]

Where an employee's injury resulted in the loss of several finger's, he was awarded compensation for permanent partial incapacity, and later, due to the fact that his injuries prevented him from obtaining employment, an award was made for total incapacity, to continue indefinitely, subject to the right of review. Upon appeal this order was affirmed.[37]

Where an employee lost several fingers on each hand, it was contended that he was entitled to an award for a permanent total disability. The court held that under the provisions of the Washington Act the claimant's injuries only amounted to permanent partial disability, and an award of $1,200.00 was proper, even

34. Borgsted v. Shults Bread Co., 180 App. Div. 229, 167 N. Y. Supp. 647, 1 W. C. L. J. 666.

35. Blaes v. E. W. Bliss Co., 177 App. Div. 370, 163 N. Y. S. 722.

36. Lovalo v. Mich. Stamping Co., 202 Mich. 85, 167 N. W. 904, 2 W. C. L. J. 289, 18 N. C. C. A. 465.

37. In re Stickley, 219 Mass. 513, 11 N. C. C. A. 431, 107 N. E. 350.

though it was not the maximum amount allowable, since the commission is vested with discretion in this matter.[38]

Where a shingle sawyer, by, losing the thumb and finger of his hand, was totally incapacitated to follow his usual employment, although capable of doing other work, an award for permanent total disability was made and sustained upon appeal, the court saying: "Where a statute plainly says, as this one does, that the loss in case of partial disability shall consist of such per centage of the weekly earnings of the employee as shall fairly represent the proportionate extent of the impairment of his earning capacity in the employment in which he was working at the time of the accident, we fail to see how the court would be justified in adding thereto the following limitation: 'Less such sums as the employee might be able to earn in some other calling.' "[39] The Wisconsin Act was amended in 1913 to award compensation only when the employee was disabled to work in any employment.

The California Act compensates only for the loss of earning power, and not for inability to do any particular class of work.[40]

An employee's right hand was cut and most of the flexor tendons were severed, and the little finger of his left hand was so injured as to be incapable of use. An award for total incapacity was made. The question was what additional compensation he was entitled to under the amendment of 1913, c. 445, which, in substance, provided that additional amounts should be paid in case the injury to the hand, etc., is such that the member is not lost, but so injured as to be incapable of use. The insurer contended that the term "incapable of use" required total incapacity for use. The court held that the incapacity to use the hand need not be tantamount to an actual severance thereof, it being sufficient if the normal use of the hand had been taken away.[41]

38. Sinnes v. Daggett, 80 Wash. 673, 140 Pac. 5, 11 N. C. C. A. 432.

39. Mellen Lumber Co. v. Indus. Comm., 154 Wis. 114, 142 N. W. 187, 3 N. C. C. A. 649, Ann. Cas. 1915B, 997; Stevenson v. Illinois Watch Case Co., 186 Ill. App. 418, 5 N. C. C. A. 858.

40. Shannon v. Hercules Powder Co., Cal. Ind. Acc. Comm., 4 N. C. C. A. 860.

41. In re Meley, 219 Mass. 136, 106 N. E. 559, 8 N. C. C. A. 484.

Where an employee entered upon his employment with one hand and lost that hand as the result of an accident, the court, in holding that he was entitled to an award for permanent total disability, said: "The claimant, by the accident, has lost all the ability he had of earning a living. The disability is therefore total. His wages were evidently based upon the fact that he was previously partially disabled, and therefore the compensation to be awarded to him will be based upon such wages."[42]

Injuries resulting in the loss of use of both hands was held not to show a loss of the hands within the meaning of the compensation act.[43]

Where an employee sustained injuries to his hand incapacitating him from following his usual labors but recovered sufficiently to induce the employer to offer him employment at higher wages than he received prior to the injury it cannot be said that he was totally incapacitated.[44]

§ 421. **Injury to or Loss of Leg or Foot.**—A carpenter, 60 years old, was struck in the hip, resulting in its fracture. Thereafter he was unable to go about without the aid of crutches and was unable to do carpenter work, especially work requiring climbing or standing upon his feet. He was illiterate and capable only of manual labor. Up to the time of the trial he had done no work, and testified that from the way he felt he would never be able to do any. The Louisiana Act provides compensation for total disability to do work of any character. In affirming an award for total disability, the court said: "We have to hold, therefore, that the disability of a workman who has lost the use of one of his legs from the hip joint down is not necessarily total, since within the meaning of our said statute many lines of work are open to a man in that condition. Inasmuch, however, as up to the time of the trial the plaintiff had been unable to do work

42. Schwab v. Emporium Forestry Co., 167 App. Div. 614, 153 N. Y. Supp. 234.

43. Ballou v. Indus. Comm., — Ill. —, (1921), 129 N. E. 755.

44. Kling v. National Candy Co., — Mich. —, (1920), 180 N. W. 431, 7 W. C. L. J. 318.

of any kind, he was up to that time totally incapacitated; and this incapacity will continue as long as the healing process of nature shall not have been so far accomplished as to enable him to do manual work of some kind. * * * Elderly men are nowadays more or less out of the running when it comes to securing employment, and if by this infirmity plaintiff has been converted from an able-bodied carpenter securing work regularly in his trade into an infirm (sic) unable to secure remunerative employment of any kind, his incapacity must be held, we think, to be total under the statute. He is illiterate, and capable only of manual labor. The statute is intended to be essentially practical in its operation."[45]

A carpenter fell from a pile driver fracturing the first lumbar vertebra. There was a partial paralysis of the sphincter muscles of both the urinary bladder and the rectum resulting in loss of control of the urine and partial loss of control of the bowel movements, with considerable weakness of the lower limbs and back. He was able to walk to some extent without crutches, but was unable to work, as his abilities limited him to manual labor. The Wisconsin statute provided that, "Total blindness of both eyes, or the loss of both arms at or near the shoulder, or of both legs at or near the hip, or of one arm at the shoulder and one leg at the hip, shall constitute permanent total disability." It is further provided that: "This enumeration shall not be exclusive, but in other cases the commission shall find the facts."

"Under the power granted the commission by section 2394-9, subd. 2, to find facts constituting permanent total disability, if any such exist, we cannot say that there is no support for the determination arrived at by the commission and confirmed by the circuit court. The testimony warrants the conclusion that this man is permanently and totally disabled from performing labor at his trade as a carpenter or such labor as he was employed in at the time of the accident, as well as permanently and totally disabled from performing manual or other labor in any other

45. Myers v. Louisana Ry. & Nav. Co., 140 La. 937, 74 So. 256, 18 N. C. C. A. 858.

suitable employment. The fact that claimant desired to embark in some business to be conducted by himself and wife was immaterial when determining the question of disability."[46]

Where a workman injured his spine, causing complete paralysis of both legs, it was held that he was totally and permanently disabled, the same as though he had lost both legs.[47]

Under the New Jersey Act, it was held that permanent total disability could not be awarded for the loss of one leg, where the workman was 70 years of age, because the statute specifically provided compensation for the loss of one leg, and the age of the workman could not be considered in arriving at the amount of compensation to be awarded.[48]

Where an employee who, in a previous employment, has lost an arm, loses a leg in another employment, he is entitled to compensation as for complete and permanent disability.[49]

Compensation for specific injuries includes compensation for all temporary total loss of time, but where in consequence of the amputation of one leg the other leg becomes infected resulting in plebitis and the loss of the use of such other leg compensation may be had for the loss of both legs, or total incapacity.[50]

Under the Minnesota Act providing that an employee, who suffers a permanent loss of the use of a leg, is entitled to compensation equal to that for the loss of the leg, does not thereby prevent him from obtaining compensation in a greater amount than that provided for the loss of a leg, when an injury to a leg incapacitates for a period greater than that allowed for the loss of the leg.[51]

46. McDonald v Indus. Comm. of Wis., 165 Wis. 372, 162 N. W. 345, 18 N. C. C. A. 860.

47. In re Burns, 105 N. E. 601, 218 Mass. 8, 5 N. C. C. A. 635. Loss of use of foot equivalent to loss. Moses v. National Union C. M. Co., — Ia. —, 184 N. W. 746.

48. Bateman Mfg. Co. v. Smith, 85 N. J. L. 409, 89 Atl. 979.

49. Wabash R. R. Co. v. Industrial Comm., 286 Ill. 194, 121 N. E. 569.

50. Saddlemire v. Amer. Bridge Co., — Conn. —, (1920), 110 Atl. 63,

51. State ex rel. Albert Lea Packing Co. v. District Court of Freeborn County, — Minn. —, (1920), 178 N. W. 594, 6 W. C. L. J. 464.

TEMPORARY TOTAL

§ 422. **In General.**—Temporary total disability exists when the employee is incapacitated for the performance of any work for a limited time, after which time, he is able to resume work although he may still be partially incapacitated. As a rule the injured workman is not permitted to recover for temporary total incapacity for a certain period and then, if his incapacity becomes permanent, also recover, in addition, permanent total disability.[52] Temporary total disability may exist although the employee is capable of performing the same work, but is unable to secure employment.

"The phrase 'total incapacity for work,' as used in Workmen's Compensation Act does not imply an absolute disability to perform any kind of labor, but a person disqualified from performing the usual tasks of a workman in such a way as to enable him to procure and retain employment is ordinarily regarded as 'totally incapacitated.' Moore v. Peet Bros., 99 Kan. 443, 162 Pac. 295.

"In our opinion these decisions are correct in principle. The object of our statute was to give compensation for a total or partial loss of the capacity to earn wages. Gillen's Case, 215 Mass. 96, 99, 102 N. E. 346 (L. R. A.) 1916A, 371. If, as in this case, the injured employee by reason of his injury is unable, in spite of diligent efforts to obtain employment, it would be an abuse of language to say that he was still able to earn money, that he still had a capacity for work, even though his physical powers might be such as to enable him to do some kinds of work if practically the labor market were not thus closed to him. He has become unable to earn anything; he has lost his capacity to work for wages and to support himself, not by reason of any change in market conditions, but because of a defect which is personal to himself, and which is the direct result of the injury that he has sustained. He is deprived of the benefit which the statute promises to him if he is told that because he could do some work if he could get it, he is not under an incapacity for work, although by reason of his injury he can obtain no opportunity to work. But we said, in Donovan's Case, 217 Mass. 76, 104 N. E. 431, Am. Cas. 1915C, 778,

52. Marhoffer v. Marhoffer, 220 N. Y. 543, 116 N. E. 379.

4 N. C. C. A. 549, that the statute was to be construed broadly for the purpose of carrying out its manifest purpose." [53]

Temporary, as distinguished from permanent, disability, is a condition that exists until the injured workman is as far restored as the permanent character of the injuries will permit. So where, after the period of temporary total disability had ceased, an employee was found to be suffering from a permanent partial disability, he was entitled to an award based upon partial disability permanent in character.[54]

Where an employee suffered an injury resulting in the loss of a testicle, which did not impair his earning capacity, the court held that he was entitled to an award for temporary total disability, but denied a claim for permanent partial disability.[55]

Where injury to a servant's knee has caused a temporary total disability, and the evidence is that it will cause a permanent partial disability, he is entitled to compensation under only one of the provisions of the act.[56]

An award for permanent partial disability, resulting from injuries to one member of the body, will not bar an award for temporary total disability resulting from injuries to other members as a result of the same accident.[57]

Where an employee is receiving compensation for partial disability at the time of the second injury, which renders him totally disabled, he is not entitled to recover full compensation for total disability in addition to compensation for partial disability. The maximum amount of compensation he is entitled to receive is that

53. Home Life & Accident Co. v. Corsey, — Tex. Civ. App. —, (1919), 216 S. W. 464, 5 W. C. L. J. 319; In re Lacione, 227 Mass. 269, 116 N. E. 485; In re Sullivan, 218 Mass. 141, 105 N. E. 463, L. R. A. (1916), A. 378; Duprey's Case, 219 Mass. 189, 106 N. E. 686.

54. Vishney v. Empire Steel & Iron Co., 87 N. J. L. 481, 95 Atl. 143 11 N. C. C. A. 427; Mt. Olive Coal Co. v. Indus. Comm., — Ill. — (1920), 129 N. E. 103, 7 W. C. L. J. 272.

55. Centlivre Beverage Co. v. Ross, — Ind. App. —, (1919), 125 N. E. 220, 5 W. C. L. J. 212; Contra, Hercules Powder Co. v. Morris County Court of Common Pleas, — N. J. —, 111 Atl. 443, 4 W. C. L. J. 523.

56. Mack v. Legal, (1919), 81 So. 694, 144 La. 1017, 4 W. C. L. J. 202.

57. In re Denton; In re Good, 64 Ind. App. —, 117 N. E. 520, 1 W. C. L. J. 69, 18 N. C. C. A. 452.

allowed for total incapacity, and the second award should be for the difference between the amount due for total incapacity and the amount he is receiving for partial incapacity.[58]

Where an employee sustained an injury resulting in temporary total disability, compensation was properly awarded to begin the eleventh day after the injury and to continue during the period of total incapacity, even though upon a second hearing this holding had to be modified to harmonize with the conditions.[59]

In a Kansas Case the special findings of the jury that the extent of plaintiff's disability is "about 50 per cent," and that he would be able to earn in the future in some other suitable employment "about 50 per cent." of his usual wages, were held to be a finding of one-half disability; and where, in such a case, the jury by general verdict awarded damages of about 63 per cent, it was held that the judgment should be reduced to allow the plaintiff to recover on a basis of one-half disability, after allowing for 26 weeks temporary total disability.[60]

Under most acts there can be no award for temporary total where there has been an award for permanent partial since the specific award is in lieu of all other compensation,[61] but as previously noted the acts of ten states expressly provided that the scheduled disability period for the specific injuries of the schedule shall be "in addition to all other compensation." In Michigan compensation is allowed for the period of total disability immediately preceeding the amputation of a member, but from then on the schedule period begins and includes the healing period.[62]

58. O'Brien v. Albert A. Albrecht Co. et al., 206 Mich. 101, 172 N. W. 601, 4 W. C. L. J. 234.

59. Berry's Case, — Mass. —, (1920), 128 N. E. 894, 6 W. C. L. J. 57.

60. Gadberry v. Hutchinson Egg Case Filler Co., 104 Kan. 72, (1919), 177 Pac. 834, 3 W. C. L. J. 473.

61. Bowne v. Stamford Rolling Mills Co., — Conn. —, (1920), 111 Atl. 215, 6 W. C. L. J. 515; Hardin v. Higgins Oil and Fuel Co., — La. —, (1920), 85 So. 202, 6 W. C. L. J. 446; Kramer v. Sargent & Co., — Conn. —, 104 Atl. 490, 18 N. C. C. A. 449, 2 W. C. L. J. 777; Spring Canyon Coal Co. v. Indus. Comm., — Utah —, (1920), 193 Pac. 821, 7 W. C. L. J. 251.

62. Curtis v. Hayes Wheel Co., — Mich. —, (1920), 178 N. W. 675, 6

Under the Wisconsin Act an award for temporary total disability followed by permanent partial cannot exceed four times the average annual earnings[63]

§ 423. **Loss of Arm, Hand or Finger.**—Where a servant had three fingers and part of the thumb of the right hand cut off, and the expert evidence was to the effect that he was temporarily totally disabled, but that the hand would be 25 per cent efficient when cured the court, in construing and applying the Delaware Act, said: "His hand is badly injured, it is true, but the testimony is that it will ultimately have an efficiency equal to twenty-five per cent. If that be so, there will not be a permanent loss of the use of the hand. Subsection (c) makes no provision for such a situation.

"The injury of the appellee should not, under the facts of this case, be classified under subsection (c) of section 103, but under subsection (a), until, at least, the present total disability of the appellee for work shall become partial."[64]

In case of the loss of one sixteenth of an inch off the first phalange of the index finger, the injury not interfering with the use of the distal joint nor with the use of the entire finger, compensation cannot be awarded for the loss of the first phalange under the Illinois Act. The court said: "We are of opinion that the circuit court erred in quashing the writ of certiorari issued in this cause, and that the Industrial Commission erred in making an award for 17½ weeks, at $6 per week, for permanent partial disability, as provided in paragraph (e) of section 8 of the Workman's Compensation Act. The award of $6 a week for a period of 6½ weeks for total temporary incapacity is a proper award."[65]

Where an employee was incapacitated for work at his regular occupation by reason of the loss of several fingers and a severe

W. C. L. J. 537.

63. Karges v. Indus. Comm., — Wis. —, 162 N. W. 482, B 1 W. C. L. J. 1679.

64. Deemer Steel Casting Co. v. Frank, — Del. Sup. Ct. —, 108 Atl. 283, (1919), 5 W. C. L. J. 170.

65. Edward E. McMorran & Co. v. Indus. Comm., 290 Ill. 569, 5 W. C. L. J. 183, 125 N. E. 284.

laceration of all the tendons of the palm, he could, on the theory that, "The statute speaks in terms of disability, * * * when the disability ends, compensation ceases," recover compensation beyond the limit of 150 weeks provided for the loss of a hand, where the disability continued beyond such time, although he could work at other occupations; and this notwithstanding the provision in the act that in no case shall the amount received for more than one finger exceed the amount provided in the schedule for the loss of a hand.[66]

The word "loss," with reference to a member or function of a member, as used in the workmen's compensation act, means deprivation. The compensation is for the handicap of being without the lost member, and not for impairment of earning power. So, in holding that an employee was entitled to compensation for incapacity preceding the date of the amputation of a member, the court said: "Compensation for the loss of the member will not compensate him for the period of incapacity preceding the loss of the member. The just rule of compensation will give compensation for the period of total incapacity as well as for the loss of the member. Our act is uniformly fair in its theory of compensation. We cannot assume a legislative intent in these instances of partial incapacity at variance with this theory. Under the respondent's theory, if the payments for the total incapacity preceding the loss of the member exceeded that provided for the loss of the member, the employee must return the excess and go without compensation for the larger part of his loss. We do not need to multiply these instances. If the theory of these sections of our act be disability, as the respondent insists, it is impossible to justify awards for specific injury, which in many cases will be far less than the incapacity preceding the loss of a member. If the theory of compensation for the loss of a member is because of the handicap resulting from the loss, it is at once logical and understandable and in no wise conflicts with the award of compensation for incapacity antedating this loss."[67]

66. Schimmel v. Detroit Pressed Steel Co., 206 Mich. 449, (1919), 173 N. W. 206, 4 W. C. L. J. 413.

67. Franko v. William Schollhorn Co., 93 Conn. 13, 104 Atl. 485, 2 W. C. L. J. 770, 18 N. C. C. A. 449.

Where a workman lost the distal phalanx of his little finger, and suffered a permanent impairment of the ring finger, it was the duty of the board, in the absence of a specific provision in the statute covering the injury, to fix the period of compensation. [68]

Where a workman lost the distal phalanx of the index finger, compensation was awarded for the loss of the finger, and a claim was made for additional compensation for total incapacity the court held that there was but one injury, viz., the loss of the phalanx, for which a specific award was authorized, and that while there might be total and partial incapacity growing out of the same accidental injury, for each of which compensation might be awarded, the provisions of the act did not contemplate any such method of compensation, but provided that the compensation for the loss a specific injury was made "in lieu of all other payments." [69]

Where an employee lost his little finger and ring finger at the palm, and the middle finger at the first joint, compensation was awarded under the Michigan Act for 50 weeks, determined by adding up the number of weeks for each specific injury. It was contended that this was erroneous for the act permits compensation for disability, and the claimant was only entitled to twenty weeks, the longest time allowed for the disabilities complained of, in view of the fact that the act provides that, "in no case shall the amount received for more than one finger exceed the amount provided in the schedule for the loss of a hand." The court held that the board did not err in making the award as it did.[70]

Where a workman injured his index finger and thumb so that a portion of the bone had to be removed, rendering the thumb practically useless, the employee claimed compensation on that basis for a period of sixty weeks, though he was actually disabled

68. Kenwood Bridge Co. v. Stanley, 64 Ind. App. —, 117 N. E. 657, 1 W. C. L. J. 168, 18 N. C. C. A. 464.

69. Kramer v. Sargent & Co., 93 Conn. 26, 104 Atl. 490, 18 N. C. C. A. 449, 2 W. C. L. J. 777; Hardin v. Higgins Oil and Fuel Co., — La. —, (1920), 85 So. 202, 6 W. C. L. J. 446.

70. King v. Davidson, 195 Mich. 157, 161 N. W. 841, 18 N. C. C. A. 458.

only 13 weeks, when he returned to the same work at the same wages. The court held that under the Michigan Act he was not entitled to compensation for the loss of the thumb, but the award should have been for the period of actual disability.[71]

The court was of the same opinion where about one-half of the distal phalanx of the thumb was amputated, leaving a stump at the nail on the upper side, and a good cushion on the under side.[72]

If an employee who was partially incapacitated, was re-employed to do light work, and upon such re-employment the factory of the employer closed down and the employee was unable to secure other work, his incapacity passed from partial to total. So, where an employee was found to be totally incapacitated, it was immaterial that during the time he was so incapacitated the work of the employer had ceased or that the employee had made no attempt to secure employment elsewhere.[73]

§ 424. **Loss of Leg or Foot.**—An employee suffered an injury to his leg and received compensation for total incapacity for 54 weeks from the date of the accident. The condition of the leg at this time necessitated its amputation, and the court held that the 125 week period during which the employee was entitled to compensation for the loss of the leg, under another section of the statute, commenced with the day of the amputation, and did not date back to the time of the accident, for the provisions of the latter statute were not applicable until the leg was amputated.[74]

Where an employee sustained an injury to his knee, totally incapacitating him for work, and later necessitating several amputations, the court, in affirming an award for temporary total incapacity for 133 weeks, said: "It is contended that there is no evidence of a temporary total incapacity for 133 weeks. The acci-

71. Adomites v. Royal Furniture Co., 196 Mich. 498, 162 N. W. 965, 18 N. C. C. A. 464.

72. Packer v. Olds Motor Works, 195 Mich. 497, 162 N. W. 80, 18 N. C. C. A. 465.

73. In re Septimo, 219 Mass. 430, 107 N. E. 63, 7 N. C. C. A. 906; Macdonald v. Wilson & Clyde Coal Co. Ltd., 5 B. W. C. C. 478, 7 N. C. C. A. 907.

74. Addison v. W. E. Wood Co., 207 Mich. —, (1919), 174 N. W. 149, 4 W. C. L. J. 717.

dent occurred April 15, 1914, and the decision of the arbitrator was rendered February 2, 1917, more than 2 years and 9 months later. Erickson testified that he tried to work several times, but was unable to. From the time he visited Dr. Paulson his knee was sore and swollen. Though it improved temporarily, the pain continued. He could not walk right. Eventually it got much worse, and the amputations which have been mentioned became necessary. Dr. Robertson, physician at the hospital, testified that he thought Erickson could do light work in 3 or 4 months after his discharge. There was evidence of total incapacity to work for the time for which compensation was awarded.'' [75]

§ 425. **Injury to Leg or Foot.**—Where an employee prematurely returned to work, on the advice of the employer's physician, and rebroke his leg, the second break was the natural result of the first injury, and the Industrial Board properly reopened the case, and reinstated the compensation agreement of the parties filed with and approved by the board, so as to cover total disability.[76]

Where a servant's leg was crushed, and he completely lost its use, he was entitled to compensation in addition to that allowed for temporary total disability, such award remaining open to inquiry by the board.[77]

Where an employee suffered an injury to his foot and was awarded compensation for permanent partial disability, and upon further investigation it was determined that the injury was temporary, and payment of compensation was ordered in accordance therewith, the court, in holding that it was immaterial that the employer had paid compensation for two years under an award for permanent partial disability, said: "It is not important, at least not conclusive as a matter of law, that relator may be required to pay more for the injury, if it be held a tempo-

75. Moustgaard v. Indus. Comm., 287 Ill. 156, (1919), 122 N. E. 49, 3 W. C. L. J. 600.

76. Reiss v. Northway Motor & Mfg. Co., 201 Mich. 90, 166 N. W. 840, 1 W. C. L. J. 1008; Shell Co. of Cal. v. Indus. Comm., 36 Cal. 463, 172 Pac. 611, 2 W. C. L. J. 34, 16 N. C. C. A. 552.

77. Wilcox v. Clarage Fdry. Co., 199 Mich. 79, 165 N. W. 925, 1 W. C. L. J. 627.

rary, than would be required if held a permanent partial disability. It is apparent under the language of the statute that such a situation may often arise. The compensation for a temporary partial disability may cover a period of 300 weeks, while the same character of injury, if found to be permanent, may be fully compensated by payments during a much shorter period, amounting in the aggregate to much less than that required if the disability be temporary. But with this feature of the statute we are not concerned. It was competent for the legislature to so provide, and if there be anything wrong with the law in this respect it must be corrected by the lawmaking body. The statute is plain and unambiguous, and will admit of no construction other than that indicated. It may be remarked, however, that the period of time covered by the healing process in a particular case may be an important factor in determining the nature and character of the disability, for compensation should not be awarded for the longer period upon the naked claim that the injury is temporary.'"[78]

The Supreme Court of Michigan affirmed an award of total disability for a broken ankle, although the court said that a finding that the disability was only partial might have been sustained in view of the fact that the claimant had made no attempt to find work and had refused to submit to an operation.[79]

§ 426. **Concurrent Compensation for Concurrent Disability from Separate Causes.**—In a case where compensation was claimed under the provision of the Louisiana Act that, "In cases not falling within any of the provisions already made, where the employee is seriously permanently disfigured, about the face or head, or where the usefulness of a member * * * is seriously permanently impaired, the court may allow such compensation as is reasonable in proportion to the compensation hereinabove specifically provided in the cases of specific disabilities above named, not to exceed 55 per centum of wages during 100 weeks," the court said: "In the instant case, it is quite clear that plain-

78. State ex rel. Ritchie v. District Court, 138 Minn. 135, 164 N. W. 581, 18 N. C. C. A. 450.

79. Bruce v. Taylor & Maliskey, 192 Mich. 34, 158 N. W. 153.

tiff, in having one foot so crushed as to require amputation and the other so crushed as to require the amputation of the great toe and to leave upon the sole of the foot a scar about 2½ inches in length, and, by reason of the accident, having received a shock to her nervous system from the effects of which she suffered for from 8 to 12 months, was temporarily disabled. It is equally clear that, while that disability did not last for 300 weeks, the statute makes no provision for the cumulative effects of plaintiff's different injuries but that, when to the injury to her right foot, resulting in its total loss, there is added the injury to her left foot whereby its usefulness is seriously, permanently impaired particulary in view of the fact that she has now only the left foot to stand and bear the greater weight on, loss of the great toe from that foot is much more serious than if it were the only injury that she sustained.

"We therefore conclude that the judgement appealed from should be amended by increasing the award therein made to $4.44 per week (being 125 weeks for loss of right foot, under clause (d), and 100 weeks for loss of great toe on left foot, under clause (e), of section 8 of Act 38 of 1918); and it is so ordered, defendant to pay all costs."[80]

Where an employee suffered the total loss of an eye in addition to disability, partial in nature, due to paralysis, as the result of a single accident, the court, in holding that the injured employee was entitled to compensation in addition to that provided for the loss of the eye, said: "The subject of partial disability of this character is covered by paragraph 19 of division (c). The court is of the opinion paragraph 19 is not restricted by the provisions of paragraph 23. Paragraph 23 clearly means that the compensation allowed for specific injuries is in lieu of all other compensation for those injuries. The Legislature evidently believed the loss of a specific member or organ deserved the compensation stated, whatever else occurred. If, however, additional injury should

80. Porter v. Alfred S. Amer Co, Ltd., 146 La. 618, (1920), 83 So. 852, 5 W. C. L. J. 846.

increase the workman's partial disability, either permanently or temporarily, he should receive additional compensation." [81]

Under the Workmen's Compensation Act of Washington of 1911, and prior to the 1917 amendments, a workman was not entitled to recover, for injuries classified as permanent partial disabilities, awards aggregating more than $1500, which is the maximum provided for permanent partial disability, notwithstanding that the injuries, one to the eye and the other to the arm, were received at different times, since the combined injures did not come within the classification of permanent total disabilities enumerated in the act.[82]

The Supreme Court of Connecticut, in holding that where an accident resulted in an injury to the shoulder and also in the loss of a leg, the employee was entitled to an award for each injury, said: "In Franko v. Schollhorn Co., 104 Atl. 485, just decided, we construed section 11 of our act as providing one form of compensation during total incapacity and another for the permanent loss of a member of the body. The injury to the shoulder was a distinct injury, resulting in total incapacity; the loss of the leg was also a distinct injury, resulting in partial incapacity. For each injury, under our construction of this section, the injured employee was entitled to compensation. The fact that each injury resulted from one accident did not make of these a single injury. Nor did the act intend that compensation for the loss of a member should be in lieu of all compensation for other injuries resulting from one accident. The superior court in New Haven County, in Foley v. Demarest & Company, pointed out with great force that a contrary construction, carried to its logical conclusion, might limit the compensation in a case of total incapacity to practically nothing. For example: An injury attended with blood poisoning might incapacitate for an entire year, and the injured person would be entitled to compensation for that period, provided no amputation were necessary; but, if such injury was

81. Stefan v. Red Star Mill & Elevator Co., — Kan. —, (1920), 187 Pac. 861, 5 W. C. L. J. 695.

82. Biglan v. Indus. Comm., 108 Wash. 8, (1919), 182 Pac. 934, 4 W. C. L. J. 650.

attended with the loss of a small toe or the phalanx of the fourth finger, compensation would be limited to from six to thirteen weeks. Our act does not permit double compensation, and hence the trial court was correct in making these awards, consecutive; the award for the total incapacity to precede in payment that for the partial incapacity."[83]

As the result of an injury a workman lost 50 per cent of the usefulness of each hand, and a 10-per-cent loss of the usefulness of one eye, and the trial judge considered the loss of the hands together as 50 per cent of total and permanent disability, and allowed 200 weeks compensation, and allowed 10 per cent of 100 weeks, or 10 weeks, for the injury to the eye, making a total of 210 weeks. Reversing the award, the court said: "The extent of disability occasioned by an injury is not capable of exact measurement. The percentage of such disability is a matter to be determined by the commission in the exercise of its sound discretion, based upon a fair view of all the circumstances. Its conclusion on this matter is the determination of a question of fact, and is not subject to review by the courts unless palpably contrary to the undisputed evidence. We cannot say that the finding that Immel's injury caused a permanent disability of 20¼ per cent is contrary to the evidence."[84]

Where an injured servant is entitled to compensation for a permanent partial disability, under the Indiana Workmen's Compensation Act, Sec. 31, and a temporary total disability, under Sec. 29, the injuries arising from the same accident, compensation should be awarded him at the 55 per cent rate prescribed by the act generally, and the periods should run consecutively, not concurrently, and not to extend beyond 500 weeks, nor to exceed a total of $5,000.00.[85]

83. Olmstead v. Lamphier, 93 Conn. 20, 104 Atl. 488, 2 W. C. L. J. 774, 18 N. C. C. A. 69; Saddlemire v. American Bridge Co., — Conn. —, (1920), 110 Atl. 63, 6 W. C. L. J. 130

84. Orlando v. F. Ferguson & Son, 90 N. J. L. 553, 102 Atl. 155, 18 N. C. C. A. 453; D. V. G. Mfg. Co. v. Sorrentino, 91 N. J. L. 558, 103 Atl 190, 1 W. C. L. J. 1099.

85. In re Denton, In re Good, 64 Ind. App. —, 117 N. E. 520, 1 W. C. L. J. 69.

Under the Connecticut Act, where a specific provision is made for compensation for the loss of a member, it is "in lieu of all other payments" for the same injury, even though there may be total, and partial disability resulting from the same injury.[86]

Under the Connecticut Act, "in lieu of all other payments," refers to payment for named injuries, for which it is exclusive, but this does not limit the award to any one of the injuries compensated, nor purport to be in lieu of payments made for injuries resulting in incapacity not among the injuries named. So, where an employee suffered a laceration of his first finger, disabling him for three months, when it became necessary to amputate the finger, the compensation for the loss of the finger did not preclude compensation for the total disability preceding the amputation.[87]

Where claimant lost the thumb and index finger of his right hand, and was entitled to compensation for a period of 60 weeks for the loss of his thumb, and 35 weeks for the loss of his index finger, the court made the payments run concurrently. Remanding the case for modification, holding that there were two distinct injuries, and to allow the awards to run concurrently the amount payable weekly would exceed the statutory allowance, the court said: "This feature of the statute cannot be ignored, or the particular provision brushed aside as unimportant. It must be recognized and effect given thereto. But this can be done only by requiring payment for each injury separately, during the period prescribed by the statute, one to follow the other. That would not violate the maximum, either as to amount or the limitation of time."[88]

Where the Industrial commission awarded compensation for the loss of a thumb, and also awarded compensation for the loss of the index finger, to begin upon the termination of the first award, the question on appeal was whether the commission proper-

86. Kramer v. Sargent & Co., 93 Conn. 26, 104 Atl. 490, 18 N.C. C. A. 448, 2 W. C. L. J. 777.

87. Franko v. William Schollhorn Co., 93 Conn. 13, 104 Atl. 485, 18 N. C. C. A. 448, 2 W. C. L. J. 770.

88. State v. District Court of Hennepin Co., 136 Minn. 447, 162 N. W. 527, 18 N. C. C. A. 69.

ly awarded consecutive compensation, first during temporary disability, and thereafter for the full period for the permanent injury. The court reversed the award, remarking that the theory of the New York Act was not indemnity for the loss of a member as such, but compensation for disability to do work, saying: "Concurrent awards and consecutive awards, based on separate items of physical impairment, disconnected from earning power, alike ignore the fundamental principle that the basis of compensation is a sum payable weekly for a fixed time during which the employee is actually or presumptively totally or partially disabled and nonproductive. All compensation acts have their foundation on the failure of the common law to provide a remedy for accidental injuries where the employer was not at fault, and both right and remedy thereunder are unknown to the common law. * * * While it may be urged that the law (section 2) says that 'compensation * * * shall be payable for injuries sustained,' and that injuries are recognized by law which do not necessarily impair earning power for any fixed period, such as 'serious facial or head disfigurement,' the schedule of compensation refers to disabilities (section 15) only, and to compensation in case of disability only, and, so far as compensation is allowed for injuries which do not have any relation to disability for the full period for which such compensation is allowed, such allowances are the anomalies and not the characteristics, of the statute Any loss of physical function detracts potentially from earning power, and the Legislature is, therefore, justified in establishing a fixed period of compensation based on a specific injury, such as the loss of a finger. If the injury detracts more or less from the earning power than the period fixed by the statute, it may at least be said that the rule is simple and the scale of compensation definite. The word 'disability' in the law as we read it, therefore, means 'impairment of earning capacity' and not 'loss of a member.' * * * The entire matter is committed to the legislative discretion * * *, which has not seen fit to provide for concurrent * * * or consecutive compensation. If the act is not sufficiently broad in view of the fact that it covers negligent

as well as non-negligent injuries, we may not disregard its provisions, to deal more scientifically or justly with the subject." [89]

Where an injury to an employee resulted in the loss of one foot and injuries to the other foot and hands, an award was made for the loss of the foot, and another award for injuries other than the loss of the foot, to thus make the awards run concurrently was held to be erroneous, as the commission after making an award for total disability had no authority to make further awards, but if upon expiration of the award for total disability, there existed, by reasons of the accidental injury, other disability than that arising from the loss of the foot, a further award may be made for such disability.[90]

Concurrent awards may be made, one for serious facial disfigurement, and another for loss of earning power, but each should be distinct from the other.[91]

Where an employee lost a foot and sustained other injuries, the court, in a Michigan case, held that the award for the other injuries causing partial disability could not be made to run concurrently with the specific award for the loss of the foot, but must be made only for such time, within the statutory limit, as it con-

89. Marhoffer v. Marhoffer, 220 N. Y. 543, 116 N. E. 379, 18 N. C. C. A. 71, rev'g 175 App. Div. 52, 161 N. Y. S. 527; and see the following cases decided by the appellate division on the authority of the case of Marhoffer v. Marhoffer, ante, Yamin v. Harris Raincoat Co., 175 N. Y. App. Div. 959, 161 N. Y. Supp. 531, (1916), mem. dec.; O Connel v. Modern Mach. Tool Co., 175 N. Y. App. Div. 959, 161 N. Y. Supp. 531 (1916), mem. dec.; Naro v. Rueckheim Bros. & Eckstein, 175 N. Y. App. Div. 958, 161 N. Y. Supp. 531, (1916), mem dec.; Martelliano v. O'Mara Specialty Co., 175 N. Y. App. Div. 959, 161 N. Y. Supp. 531, (1916), mem. dec.; Kossoff v. R. H. Macy & Co., 175 N. Y. App. 959, 161 N. Y. Supp. 532, (1916), mem. dec.; Homann v. Weeks, 175 N. Y. App. 959, 161 N. Y. Supp. 532, (1916), mem. dec.; Benson v. Penney, 175 N. Y. App. Div. 959, 161 N. Y. Supp. 532 (1916), mem. dec; Days v. Trimmer & Sons, 152 N. Y. S. 603, B 1 W. C. L. J. 1299.

90. Fredenburg v. Empire U. Rys. Co., 168 App. Div. 618, 9 N. C. C. A. 773, 154 N. Y. S. 351.

91. Erickson v. Preuss, 223 N. Y. 365, 119 N. E. 555, 169 N. Y. Supp. 1093, 16 N. C. C. A. 481. For cases on additional award for disfigurement see "Double Compensation" § 571 post.

tinues after the period for which indemnity is allowed for the loss of the foot.[92]

The amendment of the New Jersey Act by P. L. 1913, page 307, concerning consecutive payments for partial and permanent disability, does not apply to accidents which happened prior to the amendment.[93]

Where an injury to a workman resulted in inability to close his eyelid, injury to his ear and skull, besides partial paralysis of the mouth and injury to the teeth and jaw, an award was made for each specific injury in addition to an award for temporary total disability, so long as the same should last, not exceeding 300 weeks; the award for temporary total disability to run first, and the various sums to run consecutively. In some jurisdictions the award for temporary total disability is not allowed until after the termination of the awards for specific injuries, and then an award is made for the time the employee is actually disabled, in addition to the specific injuries.[94]

Where a domestic servant lost a finger, and two others were made stiff as the result of infection, following the cutting of her hand on a tray, compensation for permanent partial disability was allowed for 52 weeks at $5 a week, and for 15 weeks at the same minimum wage for temporary total disability.[95]

Under the Louisiana Act, where an injury to a servant's knee has caused a temporary total disability, and there is evidence that it will cause a permanent partial disability, compensation can be awarded under only one of the provisions.[96]

92. Limron v. Blair, 181 Mich. 76, 147 N. W. 546, 5 N. C. C. A. 866; But see to the contrary Nitram Co. v. Creagh, 84 N. J. L. 243, 86 Atl. 435, 3 N. C. C. A. 587; Bonaldi v. Hamburg American Line, 36 N. J. L. J. 302, 5 N. C. C. A. 870; Loughman v. Home Brewing Co., 36 N. J. L. J. 113, 5 N. C. C. A. 870; Geo. W. Helme Co. v. Middlesex Common Pleas, 84 N. J. L. 531, 4 N. C. C. A. 674, 87 Atl. 72.

93. Baur v. Court of Common Pleas in and for Essex County, 88 N. J. L. 128, 95 Atl. 627, 11 N. C. C. A. 634.

94. Earle v. Hightstown Smyrna Rug Co., 37 N. J. L. J. 11.

95. Albe Puth, 37 N. J. L. J. 9; Days v. Trimmer & Sons, 176 App. Div. 124, 162 N. Y. S. 603.

96. Mack v. Legeai, (1919), 144 La. 1017, 81 So. 694, 4 W. C. L. J. 202.

Where compensation in the amount of $1,200 was awarded an employee for the loss of an eye, and a later injury resulted in the loss of an arm, he was entitled to an award of $1,900 for the loss of the arm and the maximum of $2,000 provided by the Washington Act relates only to unscheduled disabilities, which might be rated by the commission as permanent partial disabilities. [97]

§ 427. **Deductions and Set-Offs, and Duty of Claimant to Reduce Loss.**—Where an employer carries insurance on his employees without cost to the employees, and paid the insurance to the widow of a deceased employee before the employer's liability had been determined, the amount paid should be allowed as a credit on the amount of compensation to be paid under the award. [98]

Where it appeared that deductions were made from deceased's regular weekly wages for tools and supplies without any objection from him, the refusal to make any deduction therefor in determining wages as a basis for compensation, on the ground that there was no express agreement in the contract of hiring for such deduction, was a reversible error. [99]

Where an employee presented a claim and accepted compensation under the state compensation law for an injury wherein the compensation commission had no jurisdiction, the acceptance of compensation would not be a bar to a libel in admiralty, and the payments, if made by the employer, being deductible from the recovery, and if made by the state to be treated as gratuities.[1]

"Under the provision of the Kansas Workmen's Compensation Act that, 'in fixing the amount of the payment, allowance shall be made for any payment or benefit which the workman may receive from the employer during his period of incapacity' (Gen. Stat. 1915, Sec. 5906), an allowance for hospital charges and medical

97. Klippert v. Indus. Ins. Dept. of Wash., — Wash. —, (1921), 196 Pac. 17.

98. American Smelting & Refining Co. v. Cassil, 104 Nebr. —, (1920), 175 N. W. 1021, 5 W. C. L. J. 552.

99. Reitmyer v. Coxe Bros. & Co., 264 Pa. 372, (1919), 107 Atl. 739, 4 W. C. L. J. 644.

1. Neumann v. Morse Dry Dock & Repair Co. Inc., 255 Fed. 97, 3 W. C. L. J. 562.

attendance of a reasonable amount actually incurred by defendant for the benefit of the workman is proper (Bundy v. Products Co., 103 Kan. 40, 172 Pac. 1020); and, where the defendant has been rendered liable for such expenses, the court is justified in ordering a stay of execution until th charges are paid and the defendant is released from liability."[2]

A state fund is not entitled to have the amount recovered by the injured party from a physician for malpractice, applied to its benefit, thereby reducing the amount of its payments to the injured party.[3]

"Nor does the fact that the defendant was paid wages by the prosecutor for services of a less exacting character, rendered after the accident, affect the amount of compensation to be awarded, when the wages are paid for a service of a different nature from that performed before the accident, and for a less wage, without any agreement or understanding, if such an agreement can legally be made, that such earnings were paid on account of the compensation allowable under the act. De Zeng Standard Co. v. Pressey, 86 N. J. Law, 469, 92 Atl. 278."[4]

"The provision of the Kansas Workmen's Compensation Act (Gen. St. 1915, Sec. 5906) that, 'in fixing the amount of the payment, allowance shall be made for any payment or benefit which the workman may receive from the employer during his period of incapacity,' authorizes an allowance for hospital charges of a reasonable amount actually and necessarily incurred for the benefit of the workman, and paid by the employer."[5]

Moneys or regular salary, paid to an employee while injured, and not working, may be deducted from the total award.[6]

2. Gadberry v. Hutchinson Egg. Case Filler Co., 104 Kan. 72, (1919), 177 Pac. 834, 3 W. C. L. J. 473.

3. Smith v. Battjes Fuel & Building Material Co., 204 Mich. 9, 169 N. W. 943, 3 W. C. L. J. 333.

4. International Motor Co. v. Purcell, 91 N. J. L. 707, 103 Atl. 860, 2 W. C. L. J. 528, 18 N. C. C. A. 450.

5. Bundy v. Petroleum Products Co., 103 Kan. 40, 172 Pac. 1020, 2 W. C. L. J. 250.

6. Underhill v. Central Hospital for the Insane, 64 Ind. App. —, 117 N. E. 870, 1 W. C. L. J. 360. Contra see Murcury Aviation Co., v. Indus.

Where strikers, upon prosecution, offered to compensate an employee for injuries they inflicted upon him, such payments should be deducted from the amount of an award, since the payments required by the court was not in the way of a penalty, but in order that the assailants might indemnity their victim for the injuries he sustained.[7]

Under the New Jersey Act, if the employer makes payments or advancements to an injured employee within the first two weeks following an accident, when no payments are due, such advancements must be considered as gratuities and are not to be deducted from the award; but advancements made subsequent to the first two weeks immediately following an injury are to be deducted from an award subsequently made.[8]

In construing the provision of the Indiana Act relating to deductions, the appellate court of that state said: "Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this act were not due and payable when made, may, subject to the approval of the Industrial Board, be deducted from the amount to be paid as compensation: Provided, that in case of disability such deductions shall be made by shortening the period during which compensation must be paid and not by reducing the amount of the weekly payments unless otherwise hereinafter specified."[9]

Where a workman's assailants were sentenced to pay him weekly payments during disability, and he had assigned his cause of action to the commission, the court held, that such payments should be deducted from the award.[10]

Comm., — Cal. — 199 Pac. 508 (1921).

7. Dietz v. Solomonwitz, 179 App. Div. 560, 166 N. Y. S. 849, 18 N. C. C. A. 470.

8. Johnson v. Prendergast, 37 N. J. L. J. 277; Blackford v. Green & Pierson, 37 N. J. L. J. 279.

9. Underhill v. Central Hospital for the Insane, 117 N. E. 870, 1 W. C. L. J. 360, 64 Ind. App. —.

10. Dietz v. Solomonwitz, 179 App. Div. 560, 166 N. Y. Supp. 849, B. 1 W. C. L. J. 1301.

§ 428. **Submission to a Surgical Operation and Refusal to Accept Medical Services Offered by Employer.**—The refusal to accept medical services offered by an employer does not deprive the injured employee of all compensation, but only for such injuries or increase of incapacity directly due to the refusal of the offered services and the employment of another physician.[11]

Where an employee sustains an injury resulting in permanent disability, unless he submits to a reasonable operation which is attended with little or no danger, and medical experts are of the opinion that the results will be favorable, compensation should not be allowed as long as he refuses to undergo the operation.[12]

Where an employee's arm is so seriously fractured that it creates a total disability, which will be permanent unless the arm be amputated, the contention that the award cannot exceed that authorized for the loss of an arm is untenable. The court, in ruling upon this contention, said: "The original injury was a very bad fracture of the arm, which was compound, and became infected and discharged pus for a long period. Amputation was seriously considered, but the arm was saved. There was, however, a poor recovery, and the patient had several abscesses, and at the time of the hearing was suffering, as the court found, with a severe neuritis caused perhaps by minor nerves being involved with the callous of the fracture, which, in the opinion of his physician, made him totally unfit for work, and there was evidence to support the finding that this condition would continue indefinitely unless the arm was amputated.

"Prosecutor's claim is that the award cannot exceed that authorized for the loss of an arm, but to this we do not agree. Cases are readily conceivable in which total and permanent disability exists without the loss of or injury to any specific member. If the physical conditions in the present case as the court found them

11. Neary v. Phil & Reading Coal & Iron Co., 264 Pa. 221, (1919), 107 Atl. 696, 4 W. C. L. J. 642.

12. O'Brien v. Albert A. Albrecht Co., 206 Mich. 101, (1919), 172 N. W. 601, 4 W. C. L. J. 234; Enterprise Fence & Fdry. Co. v. Majors, — Ind. App. —, 121 N. E. 6, 3 W. C. L. J. 113; Joliet Motor Co. v. Indus. Bd., 280 Ill. 148, 117 N. E. 423, 1 W. C. L. J. 30.

to exist at the time of the hearing created a total disability which was permanent unless the arm were amputated (and we think the evidence justified a finding of such a condition), the case of Feldman v. Braunstein, 87 N. J. Law, 20, 93 Atl. 679, controls. Petitioner is not required to undergo a serious operation such as amputation of the arm at the shoulder."[13]

Where total disability is entirely due to the original injury, the state Accident Fund was not entitled to be relieved from payments on the ground that the present disability was brought about by unskilful medical treatment or the refusal to submit to a surgical operation.[14]

13. Simpson v. New Jersey Stone & Tile Co., 93 N. J. 250, (1919), 107 Atl. 36, 4 W. C. L. J. 425.

14. Smith v. Battjes Fuel & Building Material Co., 204 Mich. 9, 169 N. W. 943, 3 W. C. L. J. 333.

Cross References—For a complete discussion of matters pertaining to medical benefits and the result of an employee's refusal to submit to an operation or accept medical services tendered by the employer, see Chapter XI. "Medical Benefits."

CHAPTER IX.

EARNINGS AS BASIS OF COMPENSATION.

Sec.

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§ 429. **When Compensation May be Computed on the Basis of the Earnings of Another Employee in the Same Line of Work.**—All the American Compensation Acts base the disability benefits, to be paid to the disabled employee, upon his earnings;

though the employees earnings are not as a rule considered in compensation awards for disfigurement, unless the disfigurement is of a nature that would make it difficult for the employee to obtain and retain employment.

Practically all the acts in substance provide that the employee when disabled shall receive one half to two thirds of his average daily, weekly, monthly or annual wages or earnings. On first thought the determination of the average wages or earnings of the employee appears to present no problem, but in actual experience difficulties are frequently encountered. As for example where the employee works less than seven days a week, but claims benefits for each day he is disabled, or where he works in seasonal occupations, or at the time of the accident he is working at higher or lower wages than usual, or has just begun the work he is engaged in when injured, or is a spare time worker.

In order to determine the average earnings of an employee on a basis that is equitable alike to the employee and employer, it frequently becomes necessary to compute it on the basis of the earnings of another employee.

In arriving at the average wages of an injured employee claiming compensation under the New York Act the court said: "The claimant had worked but 45 days for the employer at the time of the injury. During this period his earnings had been $242.50, or an average of approximately $32 per week. It appeared that the average earnings of five employees in the same class for the year commencing January 1, 1917, had been $1,777.95. The commission determined under Workmen's Compensation Law (Consol. Laws, c. 67) Sec. 14, subd. 3, that claimant's weekly wages were in excess of $30, and awarded compensation for the permanent loss of the use of claimant's hand at the rate of $20 per week.

"In view of the fact that the claimant had worked for the employer only a short time, and the greater part of the work was piece work, I think the commission was justified in determining his average weekly wage under subdivision 3 of section 14, and that there is evidence to support the determination." [15]

15. Shaw v. American Body Co., 189 App. Div. 365, (1919), 178 N. Y. Supp. 369, 5 W. C. L. J. 112; In re Gorski 227 Mass. 456, 116 N. E. 811,

Where a newspaper employee worked all week for one employer and on Saturday nights worked for another, and while working for the latter was injured, the court, in construing the Massachusetts Act, held that compensation should be based only upon the wages received while in the latter's employment. The court said: "Arthur N. King, the employee, received a fatal injury while in the employ of the Globe Newspaper Company, hereinafter called the Newspaper Company. The widow was awarded compensation of $10 a week for 400 weeks. King was regularly employed each week by the Atlantic Printing Company from Monday until Saturday at noon, at a weekly wage of $28.00. Saturday nights he worked for the Newspaper Company and received $9.20 for each night's work. The Industrial Accident Board awarded compensation based on the weekly wage of $3.52, that being the average weekly amount earned by a person in the same grade, employed at the same work by the same employer. St. 1911, c. 751, part 5, Sec. 2. The insurer contended that the weekly compensation should be $6.13, based on the weekly wage of $9.20. The court said:

"King was employed by the Newspaper Company for 12 calendar months immediately preceeding the date of his injury. Because he worked for this company but one night each week during that time, the Industrial Accident Board found that, while so employed, it was impracticable to compute his average weekly wages by dividing his earnings during the 12 preceding calender months by 52.

"The cost of the insurance to the employer is determined by the wages of the employee received in this employment, and it is to be presumed that this is shown by the pay roll. Ganon's Case, 228 Mass. 334, 117 N. E. 321.

"The case at bar is to be distinguished from the Gillen's Case, 215 Mass. 96, 102 N. E. 346, L. R. A. 1916A, 371. In that

15 N. C. C. A. 1020; Fox v. Bachnor Bros. Co., (1920), 182 N.. Y. Supp. 416, 6 W. C. L. J. 371.

case the injured employee was a longshoreman. The nature of his work was such that he was not regularly and continuously employed by any one employer, but worked for different ones and his employment varied in its time and extent. Although he was continuously and regularly employed as a longshoreman, he might work for one steamship company one day, another the next; it was possible for him to be employed by more than one Company the same day and it was uncertain by whom he would be employed from day to day. The compensation decreed was based, not on the weekly wages earned by a person in the same grade of work, employed at the same work by the same employer, but upon the clause of the statute which estimates the compensation by the wages of a person employed in the same grade, in the same class of employment in the same district. By the very nature and terms of such employment it became impracticable to measure an employee's wages according to the general rule, viz., by dividing the year's earnings received from one employer by 52, and for this reason the employee came within the exceptions, already referred to, where the compensation is not restricted to the wages paid by the same employer, and where the 'custom of the employment is for continuous work of a specified kind for different employers.

"In Rice's Case, 229 Mass. 325, 118 N. E. 674, Ann. Cas. 1918E, 1052, it was decided that the compensation of a spare-time worker, who worked after school five days and all day Saturday of each week, should be computed on the wages received by her while in the employment where she was injured, in accordance with the first clause of section 2 of part 5 of the Workmen's Compensation Act relating to average weekly wages. The rule established in that case is applicable to the case at bar.

"It may be proper to add that the provision of the Workmen's Compensation Act, 6 Edward VII, c. 58 (1906) schedule (2) b, providing for compensation based on concurrent contracts of service with two or more employers, is not found in our act. It follows that the compensation should be computed on the employee's earnings for the preceding year received from the Newspaper Company divided by 52.

"The decree is to be modified by striking out the words 'ten dollars' and inserting in place thereof $6.13; and, so modified, it is affirmed."[16]

Where a miner was prevented from earning as much as other employees because he was placed in a portion of the mine from which it was more difficult to remove coal, he was entitled to have compensation based upon the wages of other miners.[17]

Where the wages of an employee were such that it was impracticable to compute the "average weekly wages" by the method first indicated in the Louisiana Employer's Liability Act, Section 3 of Act No. 20 of 1914, because the workman worked sometimes as a screwman at $6 per day and sometimes as a longshoreman at 80 cents an hour on Sundays and 60 cents an hour at nights and worked for a number of stevedores, the alternative method provided by the statute of taking the average weekly amount earned by another employee in the same grade, employed at the same work and by the same employer, during the 12 months preceding the accident was held to be proper.[18]

Where an employee was injured while crossing his employer's premises an award was based upon the rate of wages he was receiving at the time, although he had previously been making less. The court on appeal, in construing the New York act, said: "As to the third objection raised by the appellants, that the award was not based upon the proper wage, the evidence was that at the time of his death the deceased had been earning, during his employment by the St. Regis Paper Company, one dollar and eighty cents per day, and that this was the average daily wage received in that employment by an employee of the same class working the year through, although in previous employments by other employers the deceased had received a smaller sum. Computed upon the basis of compensation prescribed by subdivision 2 of section

16. Kings Case, 234 Mass.—, (1919), 125 N. E. 153, 5 W. C. L. J. 256.

17. Centralia Coal Co. v. Indus. Comm.,—Ill.—, (1921), 130 N. E. 725.

18. Behan v. John B. Honor Co., Ltd., 143 La. 348, 78 So. 589, 2 W. C. L. J. 67; Cox v. Geo. Trollope & Sons, (1916), W. C. & Ins. Rep. 270, 15 N. C. C. A. 1026; Mazzi v. Smedley Co.,—Conn.—, (1921), 112 Atl. 168.

14 of the workmen's compensation law, which is applicable in this case, the amount of the award was correct."[19]

Under the English Act it has been held to be error to allow compensation based upon the wages of another employee in the same or similar employment without considering the personal qualifications of the injured employee.[20]

Where an employee was employed by the day when he met his death, but had been engaged by the job in other employments, it was held that compensation should have been based upon the average wages of another employee in the same grade of work in the same locality.[21]

A painting contractor hired a painter who had been working intermittently and agreed upon $2.50 a day as the wages to be paid. He was injured shortly afterwards. The court said: "The evidence taken before the commission showed * * * the contracting painter exclusively engaged in such work in Stockton that the standard wage scale in that city for painters was $4.50 per day. The commission awarded the applicant, Seale, compensation on the basis of a wage scale of $4.50 per day, and its award in that behalf the petitioners now seek to have reviewed by this court upon the ground that the commission in making said award acted without and in excess of its jurisdiction.

"We are of the opinion that it is not within our province to review the award of the commission under the circumstances above stated.

"Subdivision 2 of section 17 of the California Workmen's Compensation Act reads as follows:—

'If the injured employee has not so worked in such employment during substantially the whole of such immediately preceding year, his average annual earnings shall consist of 300 times the average daily earnings, wage or salary which an employee of the same class, working substantially the whole of such immedi-

19. Bylow v. St. Regis Paper Co., 179, App. Div. 555, 166 N. Y. S. 874, 15 N. C. C. A. 1022.

20. Snell v. Mayor, etc. of Bristol, (1913), 2 K. B. 291, 7 B. W. C. C. 236, 9 N. C. C. A. 541.

21. Hove v. Royal Indem. Co., 223 Mass. 187, 111 N. E. 702.

ately preceding year, in the same or a similar kind of employment, in the same or a neighboring place, earned during the days when so employed.' St. 1913, p. 289.

"It would seem that the facts of this case bring it within the rule for the admeasurement of compensation above enunciated; and, there being a conflict in the evidence before the commission as to what the wage scale of painters is in the city of Stockton, it had jurisdiction to decide that matter, and with its discretion, in that respect, we cannot interfere."[22]

It was error to base an award on the wages earned by an employee during the six weeks prior to his injury, where he was employed at carpenter work, which continues throughout the year and it was possible to determine the wages of another employee engaged in the same work in the same locality.[23]

§ 430. **When Average Wages are to be Based on Amount Actually Earned.**—Where an employee worked five days a week the court held that the methods of calculation given in subd. 1 and 2 of Section 14, of the New York Act providing that the daily wage be multiplied by 300 and divided by 52, could not reasonably and fairly be applied. "Therefore the provisions of subdivisions 3 and 4 of that section, which require that the sum which "shall reasonably represent the annual earning capacity" be taken as a basis, and divided by 52, to determine the average weekly wages, became applicable. As said in matter of Littler v. Fuller Co., 223 N. Y. 369, 119 N. E. 554:

"If the nature of the employment does not permit steady work during substantially the whole of the year, the annual earning capacity of the injured employee in the employment is the proper basis of compensation. Section 14, subd. 3. The True test is this: What were the average weekly earnings, regard being had

22. Hickox v. Indus. Comm. 35 Cal. App. 403, 169 Pac. 1048, 1 W. C. L. J. 493; Thiebault's Case, — Me. —, (1920), 111 Atl. 419, 7 W. C. L. J. 65; North Redwood Lbr. Co. v. Indus. Comm., — Cal. App. —; 166 Pac. 828, A. 1 W. C. L. J. 267.

23. Campbell v. Cummer-Diggins Co., 205 Mich. 430, (1919), 171 N. W. 395, 3 W. C. L. J. 749.

to the known and recognized incidents of the employment, including the element of discontinuousness?

"Since the actual annual earning capacity of the injured employee was $826, and his average weekly wages were $15.88, the amount which should have been allowed to the claimant was two-thirds thereof, or the sum of $10.59 per week for 244 weeks."[24]

Where an employee had not been steadily employed, earning only $395 in seven months, and had worked only six days as fireman at $4.50 a day prior to his accident, the court held that compensation for his injuries should be based on his actual annual earning capacity under subd. 3 of Section 14, of the New York Act, and not on the basis of 300 times his daily wages as a fireman.[25] Under the Indiana Act it has been held to the contrary.[26]

A carter who had been in the same employment for three years had been absent from work through illness at different periods amounting in all to six months in three years. It was held that the amount of compensation must be ascertained by adding up the actual wages earned during the three years.[27]

Where an employee worked substantially all of the preceding year it was held that his daily wage ought to be computed by dividing the amount earned by the number of days he actually worked.[28]

The term, "average weekly earnings" is applicable only when the weekly wages differ in amount.[29]

Where an employee earned different amounts at different grades of work, the actual wages earned at the different employments should be considered.[30]

24. Remo v. Skenandoa Cotton Co., 189 App. Div. 367, 179 N. Y. Supp. 46, 5 W. C. L. J. 442.

25. Rooney v. Great Lakes Transit Corp., 191 App. Div. 10, 180 N. Y. S. 652, 5 W. C. L. J. 730.

26. Iron & Steel Co. v. Szot, 64 Ind. App. —, 115 N. E. 599, 15 N. C. C. A. 1027.

27. Greenwood v. J. Nall & Co., (1915), 8 B. W. C. C. 503, 11 N. C. C. A. 787.

28. Frankfort Gen. Ins. Co. v. Pillsbury, 173 Cal. 56, 159 Pac. 150, 18 N. C. C. A. 453.

29. Tysons v. Andrew Knowles & Sons, (1901), 3 W. C. C. 1.

30. Dobson v. British Oil & Cake Mills, (1915), 5 B. W. C. C. 405.

Where by reason of the eight-hour day, which had come into effect since the accident, the workman's wages would be reduced, it was held that the court should take this into consideration in assessing compensation.[31]

Where a boy had worked only a short time for his employer, during which time his wages were fixed by agreement, and he had never worked before except in helping his uncle during harvest, it was held that his average wages should be based on his actual wages not including what he earned while working for his uncle.[32]

§ 431. **Computation of Wages Where an Employee has Worked Less Than a Year.**—Where a boy was killed in the first week of his last employment, the court held: "The 'annual earnings of the deceased at the time of his injury,' in part 2, Section 6, of the Massachusetts Act are to be ascertained by reference to the same factors as are 'average weekly wages' in part 5, Section 2, unless inapplicable under all the circumstances. It would be a strained construction to interpret 'annual earnings' with reference only to the wages earned at the moment of injury and to calculate other payments under the act upon the footing of 'earnings of the injured employee during the period of twelve calendar months immediately preceding the injury.' The facts at bar presented a case for the ascertainment of 'annual earnings' by reference to the wages received during the twelve calendar months immediately preceding the injury. See Gillen's Case, 215 Mass. 96, 102 N. E. 346, L. R. A. 1916A, 371."[33]

Where the evidence shows that a miner worked only part of a year, the average weekly wages are to be ascertained by dividing his average annual earnings in the mine by 52, and the amount he earned in other employments when the mine was idle cannot

31. Bevan v. Energlyn Colliery Co., (1911), 5 B. W. C. C. 169, 11 N. C. C. A. 673.

32. Hoosier Veneer Co. v. Stewart, — Ind. App. —, (1920), 129 N. E. 264, 7 W. C. L. J. 289.

33. Freeman's Case, 233 Mass. 287, (1919), 123 N. E. 845, 4 W C. L. J. 498.

be included since the employment cannot be made to stand burdens not connected with the industry.[34]

In construing the Louisiana Act the court said: "If the employee had worked more than 6 months at the employment at which he was fatally injured, the total amount of his wages during that time, divided by the number of weeks in which he was employed, shows the average weekly wages as a basis of adjustment of compensation due to the dependents of the deceased employee."[35]

It was established by the evidence that the deceased, J. D. Hibbs, had been in the employment of the Midland Bridge Company for about three months or less, and not for a year, and it is provided by the Texas Workmen's Compensation Act, herein cited, that—

"An 'injured employee who shall not have worked for a year, his average annual wages shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or neighboring place, shall have earned in such employment during the days when so employed.'

"It is also provided, when it is impracticable to compute the average weekly wages, it shall be computed by the board in any manner that seems just and fair to the parties. There was evidence tending to show that employees of the same class as young Hibbs had received for the entire preceding year $4 or more per day, and consequently appellees were entitled to recover 300 times the sum of $4. The evidence was sufficient to sustain the finding of the jury that $4 a day was earned by those of the same class of J. D. Hibbs, during the preceding year."[36]

Under the Michigan Act if "the injured employee has not worked in the employment in which he was working at the

34. Andrewjwski v. Wolverine Coal Co., 182 Mich. 298, 148 N. W. 684, 6 N. C. C. A. 807, Ann. Cas. 1916 D. 724; De Mann v. Hydraulic Engineering Co., 192 Mich. 594, 159 N. W. 380, 15 N. C. C. A. 1018.

35. McQuirt v. Gillespin, 141 La. 586, 75 So. 419, 15 N. C. C. A. 1023.

36. Southern Surety Co. v. Hibbs,—Tex. Civ. App.—, (1920), 221 S. W. 303, 6 W. C. L. J. 224.

time of the accident, whether for the employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he has earned in such employment during the days when so employed.' This class is intended to include those cases where an employee who has not worked in the employment in which he was engaged at the time of his injury, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, where his daily wage or salary earned is fixed and known. In such case his average annual earnings will be 300 times such average daily wage or salary earned in such employment during the days when so employed.

"In the case of Robbins v. Original Gas Engine Company, 191 Mich. 122. 157 N. W. 437, this court, speaking through Mr. Justice Ostrander, said:

'A man may change his employment or the capacity in which he follows it. If he has done this at a time substantially less than a year before his injury, then the statute fixes 300 times his daily wages as his average annual wages.'

"When the decedent, locomotive crane operator, left the employ of the coal company on the occasion of a strike, June 21st, the relations of master and servant, of employer and employee, were at an end. It required a new contract, a new employment, to restore such relations. When he entered the service of the coal company as a mechanic on August 24th it was under a new contract a new employment, in a different capacity, at a different. wage. It was in this new capacity, this new employment, that he was working when he met his death. He had not worked in this employment 'during substantially the whole of the year immediately preceding his injury.' In fact, he had so worked but a short time. It is clear, therefore, that the decedent belonged to the second class mentioned in the Andreyjski Case, and that compensation should be computed upon the basis of his average daily wage during the days when he was so employed. It was upon this basis that the

award was made by the Industrial Accident Board, and such award is affirmed.''[37]

Wherever possible the average weekly wages of a workman should be determined by what he has earned in that employment and not by what others have earned in a similar employment.[38] So where a workman took a temporary position at lower wages while waiting to resume his regular employment, it was held that compensation for an injury sustained in the lower grade of employment should be based upon his actual earnings in that employment.[39]

Under the New Jersey Act the average weekly wages are to be determined by the wages actually earned by the employee.[40] So where a railroad man was employed at irregular intervals the wages for the basis of compensation were computed upon his actual earnings.[41]

Where an employee's total earnings for the year were $580, and only in one week did his wages amount to $6 per day, it was held that under the New York Act an award should have been based upon his actual earnings for the year and not on the wages for the one week wherein they were higher than usual.[42]

Where a spare time weaver worked three hours a day while attending school and all day Saturday, and received about three dollars a week, in determining the basis for computing compensation under the Massachusetts Act the court said: "If there is such an employment as that of 'spare weaver' similar in hours of service, kind or work and requirement of skill to that of the employee during her term of employment, then that may be used as a basis for determining the compensation to be awarded according to the express terms of the statute. Part 5, section 2. If

37. Brown v. Central West Coal Co., 200 Mich. 174, 166 N. W. 850, 1 W. C. L. J. 1086.

38. Bartlett v. Tutton & Sons, (1901), 85 L. T. 531, 4 W. C. C. 133.

39. Godden v. W. Cowlin & Son, (1913), 6 B. W. C. C. 154.

40. Wright v. Smith, 38 N. J. L. J. 231.

41. Havey v. Erie R. R. Co., 88 N. J. L. J. 684; In re Walton, 35 N. J. L. J. 184.

42. In re Cohen, 176 App. Div. 35, 162 N. Y. S. 424.

there is no such kind of employment recognized in textile manufacturing, it does not follow that the employee shall go without remuneration, but that the 'average weekly wages' actually earned by her during the time she was actually employed shall be the basis of compensation. 'Average weekly wages' in such a case is not confined to the definition set forth in part 5, Section 2. That definition governs all cases within its terms, but the general scope of the act indicates that the employee is not remediless because he does not come within any clause of that definition, provided he is an employee and is otherwise entitled to recover.

" 'Average weekly wages' in the definition not being applicable, the words 'average weekly wages' in the sections as to payment (sections 9 and 10, pt. 2), should be interpreted in their common and ordinary, sense and should be computed by dividing the total amount earned by the number of weeks of employment. The testimony and the finding of the board based thereon, show such wages to have been $3. This is one of the cases where 'a different meaning' of average weekly wages from that given in the definition 'is plainly required by the context.' part 5, section 2."[43]

Where a bricklayer was injured, the court, in determining the basis for computation of wages under the New York Act, said: "The average weekly wage of Littler was computed by the commission under subdivision 2 of section 14 of the Workmen's Compensation Law (Cons. Laws, c. *7) with the result that the award is based on annual earnings of 300 times his daily wage. No finding that bricklayers work substantially the whole of the year was made. The evidence is to the effect that they average about 30 weeks of employment at their trade in each year. Three hundred days' work in the year is the standard of steady employment. 'The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.' Section 14, subd. 4. The award should not exceed two-thirds of the earning capacity. Average annual earnings are computed under subdivision 1, 2, or 3 of section 14, as the case requires. If the nature of the employment does not permit steady work during substantially the

43. In re Rice, 229 Mass. 325, 118 N. E. 674, 1 W. C. L. J. 816.

whole of the year the annual earning capacity of the injured employee in the employment is the proper basis of compensation. Section 14, subd. 3. The true test is this: What were the average weekly earnings, regard being had to the known and recognized incidents of the employment, including the element of discontinuousness? Anslow v. Cannock Chase' Colliery Co., (1909), A. C. 435.

"In Minniece v. Terry Bros. Co., 223 N. Y. 570, 119 N. E. 1060, the question was as to the average earning capacity of the injured man as a brick molder. It did not appear that brick molders in the locality did not work substantially the whole year. The computation was properly made under section 14, subdivision 2, on the basis of the occupation in which Minniece was engaged at the time of the accident, rather than on the basis of his actual earnings in the year preceding.

"The order of the Appellate Division should be reversed and the proceeding remitted to the State Industrial Commission to compute the average weekly wage of claiment on the basis of his actual annual earning capacity."[44]

§ 432. **Where Employee Has Worked Substantially Full Year or More**—Where it was contended that the average weekly wage should be computed upon the basis of the average annual earnings of other employees working in the same class of work, if the jury should find that plaintiff had not worked in the employment in which he was engaged at the time of his injury during substantially the whole of the year next preceding the injury, the court without directly deciding this point held that the evidence showed that plaintiff worked at the employment at which he was engaged at the time of the injury for several years, and, that being true, his average weekly wages, and not the average weekly wages of other persons similiarly engaged, was the proper basis for determining the amount of compensation to be awarded him.[45]

44. Littler v. Fuller Co., 223 N. Y. 369, 119 N. E. 554, 2 W. C. L. J. 354.

45. U. S. Fidelity & Guar. Co. v. Davis, —Tex. Civ. App.—, (1919), 212 S. W. 239, 4 W. C. L. J. 310.

In construing Section 10 of the Illinois Act (Hurd's Stat. 1916, pp. 1278, 1279), the court said: "Reading all of said section together, we think it is quite manifest that the Legislature intended, if the employment operated all the working days of the year and an injured employee's wages were not determinable otherwise, that 300 should be taken as a basis from which to calculate his compensation; that if the employment operated only a part of the working days, such number, if the injured employee's annual earnings were not otherwise determinable, should be taken as a basis, but that in any event no less than 200 days should be used in such computation.

"We think the Legislature intended to make a full day's work of eight hours the basis for ascertaining the average weekly earnings, and that it did not intend to take the week as the basis for it and find the average daily earning by dividing by six, including the half holiday on Saturday, in reaching the basis of the average daily earnings."[46]

"Under the Kansas statute a workman who has been engaged for a specific employment at a fixed amount may recover from his employer compensation, based upon the earnings of persons in that grade of service, for an injury received while working for less wages in a different grade, to which he had been assigned for a short time by reason of a temporary cessation of the work for which he was employed."[47]

Where, under the Iowa Act, an employee "has been employed so as not to be within the class engaged for less than a full year immediately preceding the accident, and where his earnings are $5 a week, or more, and he suffers disability total in character and permanent in quality, he shall be allowed 50 per cent. of the average weekly wages received at the time of the injury, subject to a maximum compensation of $10 per week and a minimum of $5 per week, for not more than 400 weeks, and that to arrive at the

46. Ruda v. Indus. Bd., 283 Ill. 550, 119 N. E. 579, 2 W. C. L. J. 220.

47. Bundy v. Petroleum Products Co., 103 Kan. 40, 172 Pac. 1020, 2 W. C. L. J. 250.

amount of the award the average daily earnings in the year preceeding shall be multiplied by 300 and the multiplicand divided by 104."[48]

The Iowa Act provides that the average earnings, "if not otherwise determinable," shall be regarded as 300 times the decedent's average daily earnings, which means if not otherwise determinable by other rules contained in that section, so where decedent was employed for 229 days of the preceding year and received $1,006,33, that sum would be divided by 229 and the result multiplied by 300 to determine the statutory earnings and this divided by 52 to determine the average weekly wage upon which to base the weekly compensation.[49]

Where an employee was engaged in unloading coal at 5 cents per ton, and it was shown that he could unload about 40 tons a day, the Industrial Board determined the amount of the award under section 10, paragraph (d) of the Illinois Workmen's Compensation Act of 1913, then in force, which, in effect, provides that as to employments wherein it is customary to operate throughout the working days of the year the annual earnings, if not otherwise determinable, shall be regarded as 300 times the average daily earnings. The employer contended that the wages should have been determined under paragraph (d) of said section, which provides that as to employments in which it is the custom to operate for a part of the whole number of working days in each year, such number, if the annual earnings are not otherwise determinable, shall be used instead of 300 as a basis for computing the annual earnings. The court said: "The claim cannot be sustained. There was evidence tending to show that the work in which Mulverhill (applicant) was engaged was required to be done during the whole year, and that his employment was paying him $2 a day. The coal delivered was for the plant supplying power by which the cars of the plaintiff in error were propelled and also furnishing heat. The evidence of the chief engineer showed that the men worked shoveling coal seven days a week and about 40 tons a day

48. Richards v. Central Iowa Fuel Co., 184 Iowa 1378, 159 N. W. 696, 15 N. C. C. A. 1014.

49. Zennie v. South Des Moines Coal Co., —Iowa,—, (1921), 182 N. W. 210.

was a fair average of their work. The work was done substantially every working day in the year, and not on a part of them, only."[50]

Where an employee was paid 40 cents an hour and worked 6 days a week, earning during the preceding year $1,155.20, the commission found his average daily wage by dividing by 283, the number of days he actually worked. The insurance carrier contended that the division should have been 312, the number of working days in a year. The court said: "Section 17a(1) of the California Act bases the annual earnings upon the average daily earnings 'which he earned as such employee during the days when so employed.' The petitioner argues that 'the days when so employed' means the number of working days during which he might have worked or might have been expected to work. The respondents, on the other hand, claim that the phrase refers to the number of days during which the employee was actually engaged in work. We think the latter is the fair and reasonable interpretation of the language used. The basis of computation is the individual day upon which the workman is employed in the year during which he may have been in the employment. For this purpose each day stands by itself, and his average daily wage is the average for the year, figuring the number of days on which he earned wages. To the argument that this would produce an unjust result where the employe worked only 2 or 3 days a week, it may be said that the statute deals only with cases where the employee had worked 'during substantially the whole of the year.' It may well be questioned whether an employment which falls far short of the nornal number of working days is an employment during substantially the whole of a given period."[51]

Under the English Act, where an employee has worked for the same employer for three years preceding the date of his death, the compensation to be awarded to the dependents is the amount of actual earnings of deceased during such period or 150 pounds,

50. Decatur Railway & Light Co. v. Indus. Bd., 276 Ill. 472, 114 N. E. 915, 15 N. C. C. A. 1020.

51. Frankfort Gen. Ins. Co. v. Pillsbury, 173 Cal. 56, 159 Pac. 150, 15 N. C. C. A. 1021.

whichever is the larger sum, but not to exceed 300 pounds, and where the period of such employment has been less than three years the amount of the employee's earnings during the three years is to be deemed to be 156 times his average weekly earnings during the period of his actual employment under said employer.[52]

Under the Michigan Act, where an employee has worked in the same employment for over a year, his average weekly earnings should be computed by taking a fifty-second part of his average annual earnings. The rule of arriving at the average annual earnings, by taking three hunderd times the average daily wage, applies only to a case where the employee has worked for a time substantially less than a year prior to the injury.[53]

§ 433. **Employee Working More or Less Than Six Days a Week.** The court, in holding that the commission erred in determining that an employee worked only 5½ days in a week, where the Saturday of each week the employees worked only 4 hours and that the weekly wage must be determined by dividing the wages by 5½ to find the daily wage, said: "The week which employees were called upon to work consisted by usage of five 10 hours days and one 4-hour day. In other words, while the usage of this particular mill—brought about principally by the employees themselves in conjunction with others—was to divide the time as set forth. But the contract of employment was for a week of 54 hours, and the manner in which this was accomplished did not operate to limit the employment to 5½ days. As said by the United States Supreme Court (Renner v. Bank of Columbia, 9 Wheat, 581, 585, 6 L. Ed. 166):

'The common law knows of no fractions of a day; custom, however, and that introduced, too, principally by banks, has limited the day to a few hours of business.'

"And this custom enters into the contract. The question before the commission was, not how the employees divided up the week, but what was the earning capacity of the claimant per week.

52. Greenwood v. J. Nall & Co., Ltd., (1915), 3 K. B. 97, 8 B. W. C. C. 503, 84 J. L. K. B. 1356, 11 N. C. C. A. 787.

53. Robbins v. Original Gas Engine Co., 191 Mich. 122, 157 N. W. 437, 14 N. C. C. A. 530.

He worked some part of 6 days, and what he could earn in that time was the weekly wages of the employment. The reward should not exceed two-thirds of the earning capacity.' Matter of Littler v. Fuller Co., 223 N. Y. 369, 372, 119 N. E. 555. The true test, say the court in the case cited, is:

"What were the average weekly earnings, regard being had to the known and recognized incidents of the employment, including the element of discontinuousness.' "[54]

Where a game warden, whose duties included the procuring of a deer, aided by the tenants, was killed, and one of the questions was what would be the proper basis for computing compensation, the court said: "As to the compensation awarded the applicant the commission found that deceased has not worked substantially the whole of the preceding year in said employment, and that the earnings of an employee so working in the same neighborhood was the sum of $60 per month 'working seven days per week' from which as a conclusion of law, the commission found 'that the annual earnings of said employee at the time of his injury and death was the sum of $656.70; that the average weekly earnings were $12.53, and that 65 per cent. thereof equals $8.21,' in accordance with which the award was made. Counsel for respondent undertake to justify the conclusion reached by the commission upon the ground that the employee whose earnings were properly taken as a basis for the earnings of deceased, as provided by section 17a, subdivision 2, of the California Act, worked seven days per week for which he received the sum of $60 per month, and therefore instead of multiplying the sum of $2 found to be the average daily earnings by 300, as provided in said section 17a, subdivision 1 and 2, it should, they claim, by reason of such day labor performed exceeding six days per week be multiplied by 332, which respondent claims constitutes the average of working days in a year for employees working seven days per week. The lengthy and involved reasoning of counsel in sup-

54. Roskie v. Amsterdam Yarn Co., 191 App. Div. 649, 181 N. Y. S. 891, 6 W. C. L. J. 88 (May, 1920); Hight v. York Mfg. Co., 116 Me. 81, 100 Atl. 9, 15 N. C. C. A. 1030.

port of the contention is not at all satisfactory. Indeed, upon this record respondent concedes an absence of evidence which, in ascertaining the average annual earnings, justifies the use of any number other than that specified in section 17a, subdivision 2, as a multiplier of the daily earnings, and upon the evidence presented we find no warrant in the act for the computation in the manner made. The daily wage multiplied by 300 as provided by section 17a, subdivision 2, given $600 as the average of deceased, which sum divided by 52 (section 17a) gives $11.54 as the weekly earnings, 65 per cent of which, being $7.50, constitutes the weekly indemnity payable to the applicant."[55]

Where the contract of employment contemplates a 7 day week, it is held under the New Jersey Act that Sunday should be included in computing compensation.[56]

Each of the first three subdivisions of the New York Compensation Act, section 14, presents a separate method of ascertaining the wage basis of compensation. The first and second methods cover occupations in which work is regular or continuous; the third, occupations in which work is irregular or seasonal. The measure of regularity and continuity, as stated in the section, is approximately three hundred working days per year. The context of the section plainly indicates that the Commission is to use the second and third methods only when the first fails, and the third only when the first and second fail. The following quotation is taken from the Special Bulletin, N. Y. Dept. of Labor, pt. 2 of No. 87, p. 143:

"If an injured employee has worked either less or more than six days a week for a substantial part of the year preceding his accident, methods one and two are inapplicable to his case and method three comes into play. Three hundred, the multiplier under methods one and two, approximates the number of working days in a year for workers who get one day of rest per week and holidays. The commission and the courts do not seem to

55. O. L. Shafter Estate Co. v. Indus. Comm., 175 Cal. 522, 166 Pac. 24, 15 N. C. C. A. 1028.

56. Panacona v. Vulcanite Portland Cement Co., 37 N. J. L. J. 75.

have determined exactly how many days less or more than three hundred will bring a case under method three. The Prentice decision[57] will bring a case under method three. The Prentice decision following holds that seven days work per week for practically the entire year before the accident exceeds the standard set by methods one and two; the Leesman decision,[58] that two hundred and seventy-four days per year complies with it; and the Littler decision,[59] that thirty weeks per year falls short of it.

"Besides placing seven-day workers under method three, the Prentice decision approves of the multiplier three hundred and thirty-two determined upon by the commission for such workers, instead of the multiplier three hundred established by methods one and two. The text is as follows:

"The Commission made use of the multiplier 332 instead of 300 as fixed by the first two subdivisions and multiplied the daily wage of the claimant, which was three dollars, by 332 to ascertain his annual earnings, and divided the product by 52 to ascertain his average weekly wages as provided by subdivision 4, of the section. It appears that the Commission has adopted a rule to use the number 332 in the case of claimants working seven days a week. That number could not properly be arbitrarily selected. But it will be presumed that by examination observation and investigation the Commission has ascertained, as required by subdivision 3, that having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality," the number 332 used as it was here accomplishes a result which in the case of claimants working seven days a week "shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the accident." Subdivision

57. Prentice v. N. Y. St. Rys., 181 App. Div. 144, 168 N. Y. S. 55, 1 W. C. L. J. 685.

58. Leesman v. Drew Bros., 182 App. Div. 907.

59. Littler v. Fuller Co., 223 N. Y. 369, 119 N. E. 554, 2 W. C. L J. 354, revg. 182 App. Div. 907.

3, does not concern alone seven-day workers but includes all cases not included in subdivisions 1 and 2, and if with due regard to the requirements of subdivision 3, the Commission has ascertained that the method adopted in this case works out a fair and reasonable result, such method is protected by the statute. Certainly, on the face of it, the number of 332 is no more favorable to a claimant working seven days a week than the number 300 is to a claimant working six days a week. Furthermore, the exact earnings of the present claimant for the year preceding the accident amounted to $986, which is approximately the amount ascertained by the Commission by multiplying his daily wage of $3 by 332. The appellant does not seem to have therefore, a substantial grievance.'

"In the Leesman case the employer and the claimant, having ascertained from the payroll the total sum earned by the injured employee for the entire year preceding his fatal accident, agreed to divide this sum by fifty-two to get his average weekly wage. The Commission disapproved of their agreement and made an award under method one, with $4.50, the daily wage of the deceased employee at the time of the accident, as its basis for ascertaining the average weekly wage. Upon appeal, the insurance carrier's attorney argued that an employee must work substanttially three hundred days per year to justify application of method one or two, and that two hundred and seventy-four days fell short of such requirement. He also showed that the employee had worked during the first half of the year preceding his accident for a daily wage of $4.25 and had received an increase of $4.50 at the begining of the second half. The Appellate Division upheld the Commission's ruling unanimously and without opinion: 182 App. Div. 907, Jan. 18, 1918. The Commission adopted an opinion of Commissioner Lyon interpreting section fourteen, as follows: * * * 'It seems to me that the insurance carrier's error in its method of computation arises out of a misapprehension of the exact intent of the Compensation Law. We are not interested per se in determining earnings of the deceased in this case during the year preceding his death. What the Compensa-

tion Law apparently is seeking is to give compensation to the deceased's dependents for a certain proportion of what it may be presumed he would have earned during the weeks subsequent to his injury. That he worked only 274 days in the year preceding his death is no reason for supposing that he would not have worked more than that length of time during the next year if he had lived and had had no injury. It appears to me that we are seeking here not so much the actual earnings of the deceased as his wage earning capacity, and the fact that he happened, during the preceding year, to work 26 days less than the 300 set up as a standard by the act, is a mere incident. What the act contemplates is that we shall find what his capacity to earn was rather than his actual earnings, and then presuming that his capacity would have remained the same for the future weeks, base compensation on that. Now the deceased's capacity to earn money of course is determined not by the number of days which he was able to secure employment, but by the rate of his pay for the days when he did work and such is the exact wording of the law, namely, "his average annual earnings shall consist of three hundred times the average daily wage or salary which he shall have earned in such employment during the days when so employed. Having determined the average wage earning capacity, per day, of a man who worked substantially the whole of the year preceding the injury, there is, I think, a conclusive presumption that the injured man, but for his injury, would have worked 300 days per year during the term of disability, or so long as compensation is payable, and this is the basis of an award under the statute.' "

§ 434. **Employment at Stated Periods.**—Where a newspaper employee worked all week for one employer and on Saturday nights worked for another and while engaged at his Saturday night occupation sustained injuries, he was allowed to recover on the basis of the average wages actually earned in the employ-

60. King's Case, 234 Mass.—, 125 N. E. 153, 5 W. C. L. J. 256.

ment alone in which he was injured. For a quotation from the opinion in this case see Section 429.[60]

A janitor left his employment to secure work elsewhere. His wife was engaged in his place and was assisted occaionally by her husband, who received no pay from her employer. Later the claimant was employed to wax the floors at stated times and was to receive 50 cents a week. The court said: "These circumstances do not warrant a finding that the deceased was employed as janitor. His only employment by Kincaide was in waxing the floor at a specified price. The finding of the single member was right in this particular.

"The case is governed by King's Case, 233 Mass.——, 125 N. E. 153. According to the controlling principles there set forth, the ruling of the single member that the average weekly wage was 50 cents and that the weekly compensation should be $4 was correct. The decree is to be reversed and a new decree entered in conformity hereto."[61]

A jobbing grinder worked under a contract of service two days each week, the balance of the time being used in working for himself. He had worked this way for over a year, when he was injured. It was held that his average weekly wages were those under the contract of service only and the earnings in his other miscellaneous undertakings must be disregarded.[62]

Under the Federal Act, in the case of a seven day adventist, who worked 5 days per week, it was held that compensation should be computed with reference to the period of disability rather than the days on which he ordinarily worked.[63]

§ 435. **Intermittent Employments.**—Where an employee had been working for defendant for five years in various capacities and his last employment with defendant, commencing two weeks before the accident and involving duties mainly of superintendence

61. Marvin's Case, 234 Mass.—, 125 N. E. 154, 5 W. C. L. J. 259.

62. Sales v. Abbott, (1916), W. C. & Ins. Rep. 124, 15 N. C. C. A. 1031.

63. In re Maurice Cookson, 2nd A. R. U. S. C. C. 70.

at a wage of $3 a day, a finding under clause (d) of Section 6, of the Illinois Act, of 1911, providing that in certain cases such earning power may be computed by taking 300 times the average amount earned by decedent during the days preceding the accident was not erroneous.[64]

Under the Michigan Act, where an employee worked for three years prior to the accident for the same employer, and his work at the time of and for 42¾ days prior to his death paid $1.90 per day, while his average weekly wage for the year prior to his death was $10.39, the award was based upon the higher rate of wages he had been making for the 43 days prior to his injury, the court held that the award should have been based upon average weekly wage for the year prior to the accident.[65]

Where the employment was irregular because of the closing down of the works, due partly to war and partly to other causes, it was held that the time lost through the closing down of the mills must be deducted since the time lost was not due to abnormal conditions as it was caused by an event which affected all persons alike.[66]

But intervals not amounting to a break in the employment should not be excluded when calculating the average weekly earnings.[67] If there has been a break in the employment, for example a strike during the period of calculation in the new employment, the test as to whether there has been a break being whether or not there has been a cessation in the relation of master and servant or not.[68]

Eleven weeks' absence from work, although the workman left his tools on the job and returned to work without a new engagement, is evidence of a break in the employment.[69]

64. Erickson v. American Well Works, 196 Ill. App. 346, 15 N. C. C. A. 1026.

65. Linsteadt v. Louis Sands Salt & Lbr. Co., 190 Mich. 451, 157 N. W. 64, 15 N. C. C. A. 1027.

66. Griffith v. Gilbertson & Co., (1915), 8 B. W. C. C. 548.

67. Keast v. The Barrow Haematite Steel Co., (1899, 1 W. C. C. 99.

68. Jones v. Ocean Coal Co., (1899), 80 L. T. 582, 1 W. C. 94; Appleby v. The Horseley Co. & Lovatt, (1899), 80 L. T. 853, 1 W. C. C. 103.

69. Hewlett v. Hepburn, 2 W. C. C. 123.

Where an employee worked irregularly, the court in affirming an award under the Michigan Act, which provided that where an employee has not worked in the employment substantially the whole of the year preceding his injury, his average annual earnings shall consist of 300 times the average daily wage which an employee in the same class of work shall have earned during the days when so employed, said: "We are of the opinion that the legislature had in mind that in every employment the employees work more or less irregularly, and that the annual earnings of any employee shall be determined by taking 300 times the average daily wage or salary which the employee has earned in such employment during the days so employed. This was undoubtedly the best method that could be provided for compensating a person; for if the employee does not work often enough to satisfy his employer, the employer has the option to discharge him. We see no error in the method adopted by the board in measuring the compensation."[70]

Where an employee was engaged in employment with the same employer for 3 years and lost 163 working days, the county court judge based the award on the deceased's actual earnings, and upon appeal the House of Lords held that it should have been based on his average weekly earnings.[71]

In determining the average wages of a longshoreman who worked irregular hours it was held that the amount earned for night work should be added to the amount earned in the daytime, and the fact that he received extra compensation for night work was immaterial.[72]

An employee engaged in cleaning roofs preliminary to painting them, worked irregularly and only occasionally. The court held that compensation should not be computed under section 17 subds. 1, 2, as amended by St. 1915, pp. 1086 & 1087, of the Cali-

70. Riley v. Mason Motor Co., 199 Mich. 233, 165 N. W. 745, 15 N. C. C. A. 1024.

71. Greenwood v. Joseph Nalt & Co., Ltd., (1916), W. C. & Ins. Rep. 267, 15 N. C. C. A. 1025.

72. Bonaldi v. Hamburg Am. Line, 36 N. J. L. J. 302.

fornia Act, both of which contemplated a kind of employment that is permanent and steady, the court saying: "Subdivision 1, obviously cannot be looked to in the present case, because Rees had not worked in this employment during substantially the whole of the preceding year. The commission seems to have gone on the view that subdivision 2, was the governing provision. But we think this subdivision equally inapplicable. Under its terms the annual earnings are measured by 300 times the daily earnings of an employee of the same class working substantially the whole of the preceding year in the same or a similar employment. As we have indicated, there is no evidence that any one else engaged in this employment or a similar one did or could work during substantially the whole of the year. Both subdivisions 1 and 2, contemplate a kind of employment which is permanent and steady, and which, for that reason, affords to an employee the possiblity, at least, of earning annually an amount measured by the number of working days in a year, estimated and fixed by the act at 300. Where this kind of employment is not shown to exist, the case falls within subdivision 3, under which the annual earnings are to be taken as the sum which will 'reasonably represent the average annual earning capacity' of the employee 'in the kind of employment in which he was then working, or in any employment, comparable therewith, but not of higher class.' Under this subdivision, the amount of annual earnings is not reached by multiplying the employee's daily earnings by any arbitrary figure, but by ascertaining from the evidence what his earning capacity in fact was. The evidence before the commission did not show that Rees could have earned in the employment in question, or in any employment comparable to it, anything more than the amount which he had actually earned in the past, which was but a fraction of the amount fixed by the commission as his average annual earnings. The award must therefore fall, inasmuch as the commission's authority to make an award depends upon evidence tending to show the existence of the conditions justifying the award."[73]

73. Mahaffey v. Indus. Acc. Comm. 176 Cal. 711, 171 Pac. 298, 1 W. C. L. J. 909.

Where the employment is continuous the average weekly wage may be computed under the Utah Act, by multiplying the average daily wage by 300 and dividing by 52; but where the employment is intermittent, the average weekly wage is determined by dividing the aggregate amount earned by the number of weeks including the weeks in which no work was performed.[74]

§ 436. **Seasonal Employments.**—Where logging operations were discontinued for 1½ months each year, the employment was seasonal and the average annual earning capacity was 10½ twelfths of the average annual earnings computed on the basis of employment during substantially the whole of the year.[75]

Where one engaged in seasonal employments and in addition secures other kinds of work between seasons, the average wages should be determined by multiplying the average monthly wages by 12 and dividing the product by 312 and then multiplying by 300.[76]

Under the California Act of 1911, in seasonal employments the average annual earnings of employees shall be taken at such sum as shall reasonably represent the average earning capacity of the employee in the employments which he has followed during the year.[77]

Where the average earnings of an employee engaged in seasonable employments for 90 days each year, would be less than a minimum of $5 a week, it was held that he was entitled to the minimum compensation.[78]

Where the evidence shows that a miner worked only part of a year the average weekly wages are to be ascertained by dividing

74. State Road Comm. v. Indus. Comm. of Utah,—Utah,—, (1920), 190 Pac. 544, 6 W. C. L. J. 405.

75. Anderson v. The Hammond Lumber Co., (1916), 3 Cal. I. A. C. 378.

76. Reger v. McCloud River Lbr. Co., 1 Cal. Ind. Acc. Comm. part II, 567; Ruprecht v. Red River Lbr. Co., 2 Cal. I. A. C. 860.

77. Brousset v. Fresno Flume & Lbr. Co., 1 Cal. I. A. C. Part I. 159; Dolbeer & Carson Lbr. Co. v. Pinkerton, (1916), 3 Cal. I. A. C. 366.

78. Morey v. Worden, 2 N. Y. St. Dep. Rep. 494.

his average annual earnings in the mine by 52, and the amount he earned in other employments when the mine was closed cannot be included.[79]

"Defendant did not operate its plant the entire year. Its 'campaign,' which is conducted in the fall, appears from this record to average some 60-odd days. The parties seem to agree that firemen are employed a few days longer, and it is agreed that they average 74 days' work during the year. The employment in defendant's plant may be termed seasonal, and the case falls squarely within Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 148 N. W. 864, Ann. Cas. 1916D, 724. That case so fully discusses the four classifications found in the statute that it is only necessary to refer to it. The compensation in the instant case should have been computed under the fourth classification in accordance with the holding in that case, which provides that where the annual average earnings cannot be ascertained by enumerated methods, they shall be such sum, as, having regard to the previous earnings of the injured employee, and of others in same or most similar class, etc., shall reasonably represent the annual earning capacity of the injured employee at the time of the accident."[80]

§ 437. **Employee Under Contract of Employment for "Year Round."**—Where an employee was engaged for the year at a stipulated wage and was killed before completing the first year, compensation was awarded under the section which provides that where an employee has worked in the same employment during substantially the whole of the year preceding his injury, his average annual earnings shall consist of 300 times his average daily wage, the court in affirming the award said: Thus it is very clear that the commission was warranted in finding these pertinent

79. Andrewjwski v. Wolverine Coal Co., 182 Mich. 298, 148 N. W. 684, 6 N. C. C. A 807, Ann. Cas. 1916 D, 724; De Mann v. Hydraulic Engineering Co., 192 Mich. 594, 159 N. W. 380, 15 N. C. C. A. 1018.

80. Cramer v. West Bay Sugar Co, 201 Mich. 500, 167 N. W. 843, 2 W. C. L. J. 332.

facts: That the deceased was employed as a rigging puller, at a compensation of $2.75 per day; that his employment was not 'seasonal,' or, to be more explicit, for a portion of the year only, but was for 'all the year around;' that when he lost his life he had not worked in said employment during substantially the whole of the year preceding his death; and that he lost his life while actually engaged in that employment. Under these facts, as found by the commission, it is manifest that, as before stated, the computation was made in accordance with the terms of subdivision 2a, of section 17 of the act. Indeed, we cannot perceive how it otherwise could justly be made under the evidence, since, as seen, the deceased was employed to perform services which the petitioner's business required to be performed during the entire year, and since, furthermore, the deceased had not 'worked in such employment during substantially the whole of' the year immediately preceding the date of his death. In such case, as shown, the commission is authorized, as it has done in this case, to make an award based upon a computation whereby the actual daily wages shown by the evidence to have been paid the deceased as an employee in the class to which he belonged was multiplied by 300, or approximately, if not actually, the number of working days in a year.'"[81]

§ 438. **Piece Work and Work by the Hour.**—"The New Jersey statute enacts (P. L. 1913, p. 313) that the term 'wages' shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident; that, where the rate of wages if fixed by the output of the employee, his weekly wages shall be taken to be six times his average daily earnings for a working day of ordinary length, excluding overtime; and that this rate of weekly wages shall be calculated by dividing the total value of the employee's output during the actual number of full working days during the preceding six months by the number of days the workman was

81. Northern Redwood Lbr. Co. v. Indus. Acc. Comm., 34 Cal. App. 2, 166 Pac. 828, 15 N. C. C. A. 1018.

actually employed. None of these provisions are precisely applicable to this case. The reference to output naturally points to piece work, and it would be difficult to hold that work by the hour was piecework, since the earnings by the hour are fixed. The earnings by output are not fixed, but depend upon the capacity, success, or good fortune of the worker. The language does, however, indicate that, in a case where weekly wages are not fixed, they shall be taken to be six times the daily wages, and that the daily wages shall be the wages for a working day of ordinary length, excluding overtime. We think it may fairly be held that the legislature meant that the daily wages should be taken to be what would be earned by working for the ordinary number of hours, and that the employee was not to lose by reason of enforced idleness during some of those hours, nor to gain because on some days he worked overtime."[82]

It was held by the Minnesota Labor department that: "The employee is entitled to compensation according to the wages per week that he is actually earning. To find his annual wage you would multiply his weekly wage by fifty-two, and to find his monthly wage you would divide the annual wage by twelve. If the employee is engaged in an occupation where his wages fluctuate from week to week, or month to month, or even by seasons, and it is possible to determine his wages for a period of time, it would appear that the average which he earned would be wage. This, of course, would be the only way that you could determine the wages of a piece worker."[83]

Where an employer told a workman to "come Monday morning, I will give you some work to shave skins," that the price was to be 15 cents a dozen, and if the workman did better work, 16 cents, the evidence was sufficient to support a finding that the employment was not casual, but that the intent was to give the workman employment at "piece" work. The petitioner worked only part of the day and was injured at 11 o'clock, having made $1.60. The

82. Smolenski v. Eastern Coal Dock Co., 87 N. J. L. 26, 93 Atl. 85, 9 N. C. C. A. 531.

83. 6 N. C. C. A. 816.

court said: "We have more difficulty with the basis on which the compensation was computed. There was no daily wage earned in Schaeffer's employ. Our statute does not contain the provision found in the English statute as to average wages, and the case seems not to be within the express language of the Act, which makes no provision for the case of piece work. It allows 50 per cent of daily wages, with a maximum allowance of $10 per week. The petitioner had earned $1.60 up to 11 o'clock in the morning. He was capable of doing 30 dozen or more skins per day, which would bring him $4.50 or more per day. It requires no strain of language to say that at the time of the injury he was earning at the rate of $4 per day. Unless cases of men who are paid by the piece are to be excluded from the benefit of the statute, we know no other way to determine the amount of their compensation, and we cannot bring ourselves to believe that the Legislature meant to exclude them."[84]

The provision of the New Jersey Workmen's Compensation Act requiring wages to be determined from the amount earned for six months prior to the accident,[85] and the provision that the weekly wages shall be taken to be 6 times the average daily wages for a day of ordinary length excepting overtime,[86] applies to piece work, or possibly to work by the hour for irregular hours, but not where the workman receives specified wages per day.

Where an employee worked at piece work for less than 6 months, the court took the amount actually earned and divided it by the number of days actually worked to determine the average weekly wage.[87]

84. Schaeffer v. De Grottola, 85 N. J. L. 444, 4 N. C. C. A. 582, 89 Atl. 921.

85. Birmingham v. Lehigh & W. Coal Co., 95 Atl. 242, 11 N. C. C. A. 630.

86. Conners v. Public Service Electric Co., 89 N. J. L. 99, 97 Atl. 792, 13 N. C. C. A. 322.

87. Endler v. Guerther, 37 N. J. L. J. 114; Fiocca v. Dillon, S. D. R., vol. 7, p. 399; Claremont v. DeCoss, S. D. R., 175 App. Div. 952, 161 N. Y. S. 492, 220 N. Y. 671; Sullivan v. Preston, 177 App. Div. 110, 163 N. Y. S. 692; Tsangournos v. Smith, 183 App. Div. 751, 171 N. Y. S. 256; Furnett v. Ross Co., 181 App. Div. 910.

§ 439. **Wages Based Upon the Reports of Employer and Employee.**—Where an employer and employee in their reports to the commission stated that the injured employee was making $6 per day, but the pay roll showed that this report was untrue, the commission made an award based upon the report. The court said: "The reports made to the commission were entitled to consideration, but are not conclusive, and when it appears that they are founded on inadvertence, or are inaccurate, they should be disregarded. The effort of the commission should have been to determine the average weekly wages of the claimant in accordance with the facts, and according to the conditions as they actually existed, and not according to some theoretical conditions, which, had they existed, might have increased the earnings of the claimant. Why the commission adhered to these reports in the face of uncontroverted evidence that they were clearly erroneous is beyond our comprehension. The commission had not found from the entire evidence the average weekly wages of the claimant as it should have done, and made that the basis of the award, but, on the contrary has merely found what was reported to the commission by the employer and employee. There should be a finding in accordance with the facts as to the average weekly wages of the claimant, and that should be made the basis of the award."[88]

§ 440. **Tips or Gratuities to be Considered When.**—Where the industrial commission considered tips as part of a Pullman porter's salary in awarding compensation, the court in upholding such a course said: "It is urged, however, that the award rested upon a wrong basis as to tips received by the porter, which were treated as a part of his wages, and an ingenious, but unsuccessful, attempt is made to distinguish this case from Sloat v. Rochester Taxicab Co., 177 App. Div. 57, 163 N.Y. Supp. 904. It is urged that in that case it was understood that the tips were to be a part of the compensation. The facts in this case overwhelmingly point to the same result. It is improbable that the company could em-

88. Cohen v. Rothstein & Pitofsky, 176 App. Div. 35, 162 N. Y. S. 424, 15 N. C. C. A. 1031.

ploy a porter for $1 a day, if other compensation was not in contemplation. The company puts its patrons in the hands of underpaid porters, expecting that the patrons will not suffer the porter to remain underpaid, but will help the company pay for the services rendered by them. Such is the common understanding."[89]

The question as to whether tips are to be considered in estimating the compensation of injured employees under the English Statute has been uniformly decided in favor of their inclusion.[90]

The California Act provides "In determining such average weekly earnings, there shall be included the market value of board, lodging, fuel and other advantages received by the injured employee, as part of his remuneration and which can be estimated in money, but such average weekly earnings shall not include any sum which the employer paid to the injured employee to cover any special expenses entailed on him by the nature of his employment."[91]

The court, in holding that tips received by a taxicab driver were to be considered in determining the amount of an award, said: "The employer and employee knew that an average of about eighty-five cents per day would be received from tips, and clearly the compensation paid by the employer was based upon that assumption. If the employee had turned the tips over to the employer, as probably would have been his duty in the absence of an understanding to the contrary, the wages of the employee undoubtedly would have been seventeen dollars and ten cents a week. If the employee receives from the employer twelve dollars and retains the five dollars and ten cents tips, he is getting through or from the employer seventeen dollars and ten cents per week, and if the employer paid the employee seventeen dollars and ten cents a week and the tips were turned over to the employer, the result to

89. Bryant v. Pullman Co., 188 App. Div. 311, (1919), 177 N. Y. S. 488, 4 W. C. L. J. 533

90. Penn. v. Spiers, etc., (1908), 1 K. B. 766, 4 B. W. C. C. 401; Skailes v. Blue Anchor Line, (1911), 1 K. B. 360, 5 B. W. C. C. 16; Knott v. Tingle, etc. Co., 4 B. W. C. C. 55; Helps v. Great Western Ry., (1917), W. C. & Ins. Rep. 199.

91. Hartford Accident and Indemnity Co. v. Indus. Comm., —Cal. —, (1919), 183 Pac. 234, 4 W. C. L. J. 593.

each would be the same. Neither the employer nor the employee contemplated that the employee should receive but twelve dollars a week for his services; each expected that he would receive on an average of seventeen dollars and ten cents per week. The employee could not have received the tips if the employer had not put him in the way of getting them, and we may conclude that the tips were an advantage received from the employer similar in effect to board, lodging or rent furnished in addition to the wages paid. * * * The usual tips have come to be considered a part of the cost of entertainment at a hotel, upon a sleeper or public conveyance, and it is realized both by the person paying and receiving them that it is a part payment of the wages which the employer compels the person served to pay. In effect, therefore, the employer and not the employee alone is benefited by the patrons of the company. * * * The court should treat these tips in the same manner in which the employer and employee treat them, as a part of the compensation to be received by the employee for the services rendered the employer—a part of the wages, a part of the average earnings of the employee."[92]

Where an employer subsequent to the contract of hiring, gave the employee $10 a month extra in the form of a bonus, it was held that this was part of his wages to be considered in determining the amount of compensation.[93]

The Supreme Court of New York, in holding that bonuses were to be considered as wages of the injured employee, said: " 'Wages' means the money rate at which the services rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer. (Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), Sec. 3, subd. 9, as amd. by Laws of 1917, chap. 705.) These

92. Sloat v. Rochester Taxicab Co., 177 App. Div. 57, 163 N. Y. S. 904, 15 N. C. C. A. 1016, Aff'g. 221 N. Y. 491, 116 N. E. 1076; In re Ethel M. McHardy, 3rd. A. R. U. S. C. C. 165.

93. Walker v. Skillman, 38 N. J. L. J. 269; Skailes v. Blue Anchor Line, (1910), 4 B. W. C. C. 16; Gray v. Richards, —Me.—, (1921), 113 Atl. 9.

bonuses were paid 'to encourage each employee to make his work as efficient and economical as possible, eliminating all waste, both of material and effort.' They were paid in order to keep the men, and as wages.''[94]

Where this question is not specifically covered in the act to the contrary it may be stated as a general rule that before tips can be considered as part of an employee's salarly, it must be shown that his employer knew that the employee was receiving tips and the employer contemplated that he should receive such gratuities.[95]

§ 441. **Probable Increase of Wages.**—An award of compensation based upon a minor's probable increase in wage at the time he reaches the age of 21 is justifiable under the California Compensation Act, but an award based upon his probable earning capacity within a reasonable time thereafter is erroneous.[96]

''Section 17c of the California Workman's Compensation Act is in its essential parts as follows:

'If the injured employee is under twenty-one years of age, * * * his average weekly earnings shall be deemed * * * to be the weekly sum, that under ordinary circumstances he would probably be able to earn after attaining the age of twenty-one years, in the occupation in which he was employed at the time of the injury, or the occupation to which he would reasonably have been promoted, if he had not been injured.' St. 1915, p. 1086, section 6.

''The Industrial Accident Commission made the award upon the assumption that 'after attaining the age of twenty-one years' means a reasonable time after majority. It was the theory that, if the wages being earned at the time of injury were essentially 'boy's wages,' then the commission might base the amount of

94. Ciarla v. Solway Process Co., 184 App. Div. 629, 226 N. Y. 566, (1919); Wilkes v. Rome Wire Co., 184 App. Div. 626, 172 N. Y. S. 426.

95. Begendorf v. Swift & Co., 183 N. Y. Supp. 917, (1920), 6 W. C. L. J 560.

96. Western Pac. R. Co. v. Indus. Acc. Comm., 180 Cal. 416, 1919, 181 Pac. 787, 4 W. C. L. J. 348.

compensation upon "the adult's wages which the same individual would be expected to reach within the few months, or perhaps even a few years after passing the age of twenty-one.

"With this view of the law we cannot agree. The infirmity of the rule must be apparent when we remember that there is no rule by which the exact difference between 'boy's wages' and the 'man's wages' may be computed. This applicant was in his twenty-first year at the time of the injury. Under the statute quoted above the commission was bound to find his probable earnings at the age of 21 years. Such an interpretation of the word, 'after' is fully in accord with sound reason and authority For example bequests to take effect 'after death' vest at death In re Swinburne, 16 R. I. 208, 14 Atl. 850; Downing v. Wherrin, 19 N. H. 9, 49 Am. Dec. 139; Atwell's Executors v. Barney, Dud. (Ga.) 207, In 2 C. J. 395, among the definitions of 'after' given are 'as soon as; at or immediately after; on; simultaneously; upon.' That the framers of the Compensation Act intended the word "after to mean 'at' is obvious when we have in mind that different parts of a statute are to be so construed as to make them consistent and harmonious, giving proper effect to each of them. If the young man had been 21 years and 1 day old when he was injured, the commission would have been under the necessity of fixing his compensation in accordance with his wages at that time. To hold that because he was a few months under the age of 21 a much more flexible rule should apply would be an interpretation of the statute in a manner out of harmony with the part having reference to adults. Therefore we must hold that the Industrial Accident Commission had no power to compute the compensation upon the basis of probable wages which appellant might obtain long after reaching the age of 21 years."[97]

In discussing this question under the Massachusetts Act the court said: "This case involves the construction of St. 1915, c. 236. It is in these words:

'Whenever an employee is injured under circumstances that would entitle him to compensation under the provisions of chapter

97. Hyman Bros. Box & Label Co. v. Indus. Acc. Comm., 180 Cal. 423, (1919), 181 Pac. 784, 4 W. C. L. J. 343.

seven hundred and fifty-one of the acts of the year nineteen hundred and eleven, and acts in amendment thereof, and in addition thereto, if it be established that the injured employee was of such age and experience when injured that, under natural conditions, his wages would be expected to increase, that fact may be taken into consideration in determining his weekly wages.'

"In ascertaining the wages under the instant statute the circumstances to which weight can be given must be confined to the particular employer and kind of industry in which the injury was received. The increase of wages to which weight may be given is that which have been expected from the particular employer in conducting his industry 'under natural conditions.' "[98]

The court in holding that an award was not excessive because the commission based its finding upon the probable increase in the minor's wages, said: "At the time of receiving these injuries the claimant for about 3 months had been filling the position of fourth hand or back tender of a paper machine in a paper mill. The wages then commonly paid by the mill to the fourth hand were $1.60 per day; to the third hand, $1.75 per day; to the second hand, $2 per day; and to the first hand, who had charge of the machine, $3.50 per day. The superintendent of the employer's mill testified that he was favorably impressed by the claimant; that he was a very bright boy, a good worker, and willing to work; and that to a back tender, who took hold and wanted to learn, the chances for advancement were good. It further appeared that at a neighboring paper mill back tenders received $2.75 per day. The action of the commission in advancing the average weekly wage to $14.42 was fully justified by both the law and the facts."[99]

Where motormen were allowed to select their own runs every 6 months, a motorman who was receiving $3.50 per day but who

98. In re Gagnon, 228 Mass. 334, 117 N. E. 321, 1 W. C. L. J. 84, 16 N. C. C. A. 286.

99. Carkey v. Island Paper Co., 177 App. Div. 73, 163 N. Y. S. 710, 16 N. C. C. A. 286; Claremont Country Club v. Indus. Acc. Comm., 174 Cal. 395, 163 Pac. 209, 16 N. C. C. A. 288; Kilberg v. Vitch, 171 N. Y. App. Div. 89, 156 N. Y. S. 971, 16 N. C. C. A. 289; Peck v. Onondaga Paper Co., (1911), 7 N. Y. St. Dep. Rep. 445.

might not be able to select another run at more than $3, was held to be entitled to compensation on the basis of $3.50, as the court found that it was possible and even probable under the circumstances, that he might be able to select a run paying at least as much as his present salary.[1]

In determining the average wages, the commission is not warranted in taking into consideration expected increase of wages beyond the anticipated period of claimant's disability. So where a minor was temporarily disabled an award should not have been based on his probable earnings at the age of 21 years, but any increase during his temporary disability could properly be considered.[2]

In affirming a decision of the Industrial Commission the court said: "It is urged, likewise, that the State Industrial Commission erred in fixing the probable wages of this minor at $12 per week as the basis of this award. But she was fifteen years of age, was then in the high school, and was preparing to learn telegraphy, and we see no good reason why she might not be expected to earn at least twelve dollars per week within a reasonable length of time if possessed of both hands unimpaired."[3]

§ 442. **Higher Wage at Time of Accident.**—In proceedings under the New Jersey Act of 1911, the Supreme Court in affirming a judgment, said: "The only other point suggested is that the trial judge allowed compensation based on the wages which the decedent was receiving at the time of the accident. These wages were somewhat greater than he had previously been receiving. Section 2, par. 11, subds. 'a' and 'b,' expressly provides that the compensation for temporary disability and for disability total in character and permanent in quality, shall be 50 per centum of the wages received at the time of injury. Subdivision 'c' bases the

1. Fredenburg v. Empire United Rys., 168 App. Div. 618, 154 N. Y. S. 351.

2. Ide v. Faul & Trimmins, 179 App. Div. 567, 166 N. Y. S. 858 B. 1 W. C. L. J. 1339.

3. Barringer v. Clark, 184 App. Div. 695, 172 N. Y. S. 398; White v. Argus Co., 186 App. Div. 924, 172 N. Y. S. 926.

compensation on daily wages, while paragraph 12 speaks only of wages of deceased. But we think this must mean wages at the time of injury. This may, indeed, result in injustice to the employer when the employee is paid by the piece and his earnings are unusually high at the time of injury, and an injustice to the employee when his earnings are unusually low. That, however, is a defect that the Legislature may correct."[4]

Under the Michigan Act where an employee was engaged at different grades of work during the year and at the time of the accident was drawing higher wages at a higher grade of employment, it was held that his average wages should be determined by the amount which he earned during the entire year and not based on the higher grade of work and higher wages received for a period less than a year prior to the accident.[5]

The same rule is followed under the British act unless there has been a break in the continuity of the employment so as to render the later employment a separate engagement of itself.[6]

Where there has been a change in the grade of the employment, under the British Act, the wages at the time of the accident will govern but merely a raise in the wages will not afford conclusive evidence of a change in the grade of the employment.[7]

§ 443. **Deducting Sundays, Holidays and Days Employee Was Prevented from Working Through no Fault of His Own.**—Where an employee was not engaged to work on Sundays and upon receiving an injury claimed that he was entitled to have the number of Sundays during his employment deducted from the number of weeks when determining the average weekly wages, the court in

4. Huyett v. Pennsylvania R. Co., 86 N. J. L. 683, 92 Atl. 58, 9 N. C. C. A. 540; Davidheiser v. Hay Fdry. & Iron Works, 87 N. J. L. 688, 94 Atl. 309, 9 N. C. C. A. 540; In re John Mercer, 2nd A. R. U. S. C. C. 69; In re Thomas M. Bugg, 2nd A. R. U. S. C. C. 70.

5. Linsteadt v. Louis Sands Salt & Lbr. Co., 190 Mich. 451, 157 N. W. 64, 15 N. C. C. A. 1027.

6. Price v. Marsden & Sons, (1899), 80 L. T. 15, 1 W. C. C. 108;

7. Dalgleish v. Edinburg Roperie & Sailcloth Co., (1913), 131 Scotch ct. of Sess., 6 B. W. C. C. 867.

overruling this contention said: "It is apparent, from a reading of that part of said section 76, of the Indiana Act, quoted above, that the provision with reference to 'lost days' has reference to time lost from the days he was engaged to work under his contract of employment. That is to say, if an employee is engaged in a service that requires him to work seven days in a week, such as a fireman or engineer at a plant furnishing light or water to a community, or a watchman at the plant of some industry, and he loses seven or more days during his period of work, whether they be Sundays or week days, then such days so lost should enter into a determination of his 'average weekly wages' as therein provided. But where an employee has not engaged to work on Sundays and he does not so work, it cannot be said with reason that when he has failed to work on a Sunday he has lost a day within the meaning of said section. The evident purpose of the Legislature, in making the provisions quoted above from said section 76, was to give the parties concerned a fair and just rule for the determination of the 'average weekly wages' referred to in said section 29, and as far as possible to guard against differences arising in that regard. If we should give that part of said section 76, under consideration the construction for which the employee is said to contend, it would lead to results evidently not intended by the Legislature. To illustrate: If a man should be employed to work during week days only at a weekly wage of $20, and should work every day during the 52 weeks immediately preceding an injury, resulting in total disability for work, it is apparent that his average weekly wage during such period was in truth and in fact $20. This would be manifestly so without calculation. But if we should give the provision of said section 76, quoted above, the construction for which the employee is said to contend, we would be required to deduct from the 52 weeks the number of weeks represented by the intervening Sundays, and divide the total wages received by him during said 52 weeks by such reduced number, which would show an average weekly wage in excess of $23. We cannot presume that the Legislature, in endeavoring to formulate a fair and just rule, intended that

the provision of the section under consideration should be given a meaning that would bring about such a result."[8]

Where a miner was killed, and in proceeding for compensation it was shown that in the 6 months preceding his death there were 184 calender days, during 88 of which the mine was closed, and deceased did not work, and the record contained a finding that deceased failure to work was through no fault of his own, the commission in arriving at a devisor, for the purpose of determining the average daily earnings of deceased to enable them to calculate his weekly wage, and ascertain the compensation payable, the aforementioned 88 days, together with Sundays and holidays occuring during the 6 months, were deducted, and upon appeal the commission's award was affirmed.[9]

Where an employee lost 12.97 weeks out of a year because of inclement weather, the board, under a statute which said that, if the employee lost more than two weeks, time during such period the earnings for the remainder of the year shall be divided by the number of weeks remaining after the time lost has been deducted, instead of by 52, divided the total amount earned by the actual number of weeks worked. It was contended that the words "time lost" did not include time lost through the inclemency of the weather. In overruling this contention the court said: "Ordinarily, when that word is used in connection with the time of one who works, it means the time when one might have worked but was prevented. It is often employed to express the effect of weather. It is common speech to say of the carpenter, the mason and others engaged in outdoor employment, that they have lost time because of rain, or snow, or cold. * * * It would be too narrow a definition to confine its scope to cases where the laborer might have worked but for some reason operating on himself alone and not affecting others in the same grade of employment. The plain and natural signification of the controlling words of the act covers such a case as the present. It would require some

8. In re Wheeler,—Ind. App.— 1920, 126 N. E. 689, 5 W. C. L. J. 821.

9. Rakie v. Jefferson & Clearfield Coal & Iron Co., 262 Pa. 444, 105 Atl. 638; 3 W. C. L. J. 661.

refinement so to construe it as to exclude one who was deprived of work solely because of weather from the general classification of those who have lost more than two weeks' time in twelve months.''[10]

In computing the average weekly wage under the English act the total earnings of the workmen during the relevant periods is to be divided, not by the number of weeks in that period, but by the number of weeks actually worked within that period; days on which work is done and no wages are earned are to be disregarded. This principle does not apply to cases under Schedule 1, clause (a) (1) where death results from the injury. But where enforced idleness is a regular incident of an employment, then the average weekly earnings during any period are to be calculated by dividing the sum actually earned by the number of weeks in the whole period.[11]

Where an injured employee, because of trade depression was unable to earn as much as he was physically capable of earning, it was held that he as well as others must stand this loss which every line of work is subject to, and the compensation for partial disability must be based upon the difference between his earning capacity before and after the injury, and not what he was able to earn after the injury because of the depression in that line of business.[12]

Where an employee was injured after employment for 38 calender days, during which there were 6 Sundays, 2 holidays and 6 half holidays and was prevented from working 8 days by illness the board ruled that in arriving at a divisor for ascertaining the average wage, the time lost, in all 19 days, should be deducted from the total number of calender days. The court held

10. In re Bartoni, 225 Mass. 349, 114 N. E. 663, 15 N. C. C. A. 1025.

11. Perry v. Wright & Co., Bailey v. Kentworthy Ltd., Gaugh v. Crawshay Bros., Cyfartha Ltd., (1908), 1 K. B. 441, 6 N. C. C. A. 808, 77 L. J. K. B. 236, 98 L. T. 327, 24 T. L. R. 186, 1 B. W. C. C. 351; Carter v. Lang, (1908), ct. of Sess. 1198, 11 N. C. C. A. 794; Turner v. Part of London Authority, 29 T. L. R. 204, (1913), 11 N. C. C. A. 797.

12. In re Durney, 222 Mass. 461, 111 N. E. 166, 11 N. C. C. A. 668. But see In re Septimo, 219 Mass. 430, 107 N. E. 63, 7 N. C. C. A. 906.

that the board was vested with the power to establish any reasonable methods for determining the average wage as provided for in the statute, and a rule that working days shall be construed to mean total number of days in the period of employment covered, according to the calender, less, Sundays, legal holidays, half holidays for each week, and days the employee was prevented from working through no fault of his own is reasonable under the following provision of the Pennsylvania Act: "In (cases of) continuous employments, if immediately prior to the accident the rate of wages was fixed by the day or hour, or by the output of the employee, his weekly wages shall be taken to be five and one-half times his average earnings at such rate for a working day of ordinary length, excluding earnings from overtime, and using as a basis of calculation his earnings during so much of the preceding six months as he worked for the same employer."[13]

Sundays, preceding the Monday upon which work began, are not to be included in computing the average wage.[14]

§ 444. **What Items are Proper Matters to be Deducted from Workmen's Wages.**—Compensation for the death of a workman is to be computed upon his gross earnings and not his net earnings. Therefore an employer is not allowed to have union dues and articles purchased from him by deceased deducted from the wages of deceased.[15]

Where the terms of a contract showed that both the employer and employees contemplated that deductions would be made from the employee's salary for tools used by him in his employment and such deductions were actually made from the wages for

13. Jensen v. Atlantic Refining Co., 262 Pa. 374, 105 Atl. 545, 3 W. C. L. J. 657.

14. Beers v. Beers, 180 N. Y. App. Div. 760, 168 N. Y. S. 86.

15. Springfield Coal Mining Co. v. Indus. Comm., 291 Ill. 408, 126 N. E. 133, 5 W. C. L. J. 675; Houghton v. Sutton Heath & Green Collieries Co., 3 B. W. C. C. 173; Abram Coal Co. v. Southern, 5 B. W. C. C. 125; Shipp v. Frodingham Iron & Steel Co., 6 W. R. C. C. 1, C. A; McKee v. Stein & Co., 3 B. W. C. C. 544.

a period of six months without objection, the refusal of the commission to consider such deductions when determining his wages as a basis for compensation was reversible error.[16]

"It appears that the employer furnished the appellee powder and blacksmithing for the special purposes of the employment under an agreement that these advances should be repaid out of the wages. The appellee contends that in no event should the multiplier be more than 220, and that before multiplying there should be deducted the amount of such advances. Primarily, such an agreement for advancement and reimbursement is perfectly lawful. But whether it is so in arriving at a basis of computation under the Iowa Compensation Act depends or may depend upon the provisions of that act. Now, section 8 of the act (section 2477m7) prohibits any contract, rule, regulation, or device whatsoever that shall operate to relieve the employer in whole or in part from any liability created by the Act. It is manifest that such an arrangement as to such advances might well be made to effect what is thus forbidden and if this provision stood alone we should be constrained to hold that these advancements may not be deducted for the purposes of this computation. It may be conceded that the act would be more effective if this particular provision did stand alone, but it does not. Section 2477m15 (g) provides that for the purposes of this very computation 'earnings shall not include any sum which the employer has been accustomed to pay the employee to cover any special expense entailed on him by the nature of the employment.' It is in evidence that in the agreement with the miners these advances were taken into consideration in fixing wages. In other words, the employer has customarily made a payment to the employee to cover the special expense of powder and blacksmithing which is entailed upon the miner by the nature of his employment. Whatever, then, we may think of the wisdom of this statute, we must enforce it. We therefore hold that the advancements made for said purposes cannot be considered as earnings.

16. Reitmyer v. Coxe Bros. & Co., 264 Pa. 372, 107 Atl. 739, 4 W. C. L. J. 644.

"Our conclusion is that in such case as the one before us the half of the average weekly wages should be determined as follows:

"Deduct from the gross earnings for the year preceding the injury the amount expended for powder and blacksmithing; divide this sum by a number equal to the number of days worked by the miner in that year; multiply the result by 220 and divide by 104," instead of 52 in order to get one half the weekly wages. The average number of days mines were annually operated in this district was 220."[17]

Where an employer pays to an employee having general charge of the affairs of the employer's business a fixed sum of money each month, from which the employee is required to pay an assistant, if one is employed by him to assist in the work, such sum as may be agreed upon between the employee and the assistant, the sum so paid the assistant forms no part of the salary or compensation of the employee, and in determining the salary of such employee the amount paid the assistant must be deducted from the total amount paid by the employer.[18]

The value of services rendered to a workman by the members of his family should not, in the absence of an express agreement to remunerate them, be deducted from his wages when computing his average weekly earnings; but the amount paid to an assistant should be deducted.[19]

Overtime and double time on holidays should, under the English Act, be considered in computing compensation.[20]

Advancements for the upkeep of vehicles or wages allowed for horse hire, are not to be included as wages.[21]

17. Richards v. Central Iowa Fuel Co., 184 Iowa 1378, 166 N. W. 1059, 1 W. C. L. J. 977.

18. State ex rel. Gaylord Farmers' Co-Operative Creamery Ass'n v. District Court of Sibley County, 128 Minn. 486, 9 N. C. C. A. 86, 151 N. W. 182.

19. Roper v. Freke, 31 T. L. R. 507, 139 L. T. 180, (1915), 9 N. C. C. A. 86.

20. Priestley v. Port of London Authority, (1913), 6 B. W. C. C. 105.

21. Mitchell v. Alfred Stahel & Sons, (1916), 3 Cal. I. A. C. 303; Clark v. Los Angeles County, 1 Cal. I. A. C. (part II) 623, 12 N. C. C.

§ 445. **When Board and Room Value Should be Considered as Part of Wages.**—The court in holding that the free board received by a hotel employee should not be included in computing wages, said: "It may be added that such an uncertainty in the basis of compensation of benefits as the item of board when unvalued, fruitful of litigation as it must inevitably be, is notoriously inconsistent with the purpose in mind when the Maryland Workmen's Compensation Act was planned. Section 18 of the act provides that:

'In computing the pay roll the entire compensation received by every workman employed in extrahazardous work and insured in the state accident fund, within the meaning of this act, shall be included, whether it be in the form of salary, wage, piece work, overtime, or any allowance, in the way of profit-sharing, premium, or otherwise, and whether payable in money, board or otherwise. Provided the money value of board and similar advantages shall have been fixed by parties at the time of hiring.'

"The compensation to which the appellant was entitled as provided by section 35 of the act was 50 per centum of his average weekly wages. It is clear the Legislature did not intend, as to insurance in the state accident fund, that board was to be included as wages, unless its money value was fixed by the parties at the time of the hiring. And for the reasons stated by Judge Bond in his opinion, it would be unreasonable to hold that it was intended that the premium and rates of insurance from which the fund to pay losses were derived were to be calculated upon a narower basis than that adopted for the allowance of compensation."[22]

Where both parties to the contract of employment considered board to be worth $4 a week, it was a proper item to consider in determining the amount of compensation allowed.[23]

A. 177; Kid v. New York Motion Picture Co., 1 Cal. I. A. C., (part II), 475.

22. Picanardi v. Emerson Hotel Co., 135 Md. 92, (1919) 108 Atl. 483, 5 W. C. L. J. 394.

23. Medland v. Haule Bros., 202 Mich. 532, 168 N. W. 446, 2 W. C. L. J. 656.

Under the New Jersey Act, board, house rent and any other articles or privileges, which enter into the contract at the time of hiring or are subsequently agreed to when their money value has been agreed upon, are proper items to be considered in computing wages.[24]

Under the Connecticut Act the court will, in the absence of an agreement as to the value of board, take judicial notice of its value.[25]

Under the English Act, board, lodgings and equipment, are considered proper elements to include when arriving at the wages of a workman.[26]

§ 446. **Absence of Agreement as to Rate of Wages.**—Where no agreement as to wages has been made between the employer and employee, an agreement may be implied that they had in mind the usual rate of wages in that locality for that particular class of work.[27]

Under the New Jersey Act, in the absence of an agreement as to the amount of wages, the employee was at least entitled to the minimum of $5 per week as compensation.[28]

§ 447. **Dual Employments and Employers.**—Where an employee was engaged as janitor under separate concurrent contracts with three employers, and while washing windows for one of them fell, sustaining injuries resulting in death, the court in holding that the award of 55 per cent of his average weekly wage should have been based on the earnings received from all the employers. said: "If Howard had been in the joint service of the

24. Walker v. Skillman, 38 N. J. L. J. 269; Baur v. Ct. of Common Pleas, 88 N. J. L. 128, 95 Atl. 627, 11 N. C. C. A. 634.

25. Wallack v. Sorensen. 1 Conn. Comp. Dec. 197.

26. Rosenquist v. Bowring & Co., (1908), 98 L. T. 773, 1 B. W. C. C. 395; Dothie v. MacAndrew & Co., (1908), 1 B. W. C. C. 308; Abram Coal Co. v. Southern, (1908), 5 W. C. C. 125; Great Northern Ry. Co. v. Dawson, (1905), 7 W. C. C. 114.

27. Jones v. Walker, (1899), 1 W. C. C. 142.

28. Mueller v. Oelkers Mfg. Co., 36 N. J. L. J. 117, 6 N. C. C. A. 960.

three employers, then, under section 49 of the Indiana Workmen's Compensation Act, all of the employers would have contributed to the payment of the compensation in proportion to their respective wage liability. He was not in the 'Joint Service' of his employers, but in the employment of all, under concurrent contracts of service. There is no provision in the act for the joint liability of employers who hold independent concurrent contracts with the same employee. If the Legislature had intended to make concurrent employers all liable for compensation in a case like the one at bar, it would in all probability have made special provision as it did with reference to joint employers. Therefore, if the widow of Howard is to be compensated on the basis of the total average weekly earnings of Howard, it must be by employer A, whom he was serving at the time of his injury and death. The amount she should receive must depend upon the construction of clause (c) of section 76, supra. The term 'average weekly wages,' used in section 40 of said act, is defined in said clause (c) of section 76 to be 'earnings of the injured employee in the employment in which he was working at the time of the injury.' Does this definition mean that the average weekly wages of Howard is the amount he was receiving from the one employer for whom he was washing windows at the time, or does it mean the amount he was receiving in his employment as janitor? What is meant by the words 'in the employment?' Webster defines 'employment' as 'occupation, business, which engages head or hands.' Worcester says, 'employment' means 'business occupation, object of industry engagement, vocation, calling or profession.' If we apply these defintions to the word 'employment' as used in clause (c) of section 76, as we must, then, under the facts of this case, Howard's employment was that of janitor, and he was engaged in that employment for three employers, and was injured while so employed.

"It follows that the compensation to be paid to the widow should be based upon the total earnings received by Howard from his three employers."[29]

29. In re Howard, —Ind.—, (1919), 125 N. E. 215, 5 W. C. L. J. 208; In re Wm. H. Minnick, 3rd. A. R. U. S. C. C. 100.

Under the Massachusetts Act ,in which average weekly wages are defined to mean "earnings of the injured employee during the period of twelve calendar months immediately preceding the date of the injury, divided by fifty-two, but if the injured employee lost more than two weeks time during such period then the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted," it was held that a longshoreman who was injured while in the service of an employer for whom he had worked only a few days each week, but was continously employed for various employers during the entire year, was entitled to compensation based on the total wages received from all employers.[30]

Where a laundry worker was injured, it was held that wages received in giving music lessons could not be considered in determining the basis of computing compensation.[31]

Where an injury to an employee incapacitated him for giving music lessons on the violin, it was held that earnings received from this source must be disregarded when computing his average annual earnings, as the permanent disability rating is based upon the occupation in which the man is engaged at the time such injury is received.[32]

A cement finisher, who also assisted with other work, was injured while assisting a carpenter at $2.50 a day. It was held that compensation should be based on his wages as carpenter's helper irrespective of the fact that as a cement finisher he received $5 a day.[33]

Where a miner engaged in other employments when the mine was not in operation, but was killed while working in the mine, it was held that compensation should be awarded on his earnings as a miner only, and not on his combined earnings.[34]

30. Gillen v. Ocean Acc. & Guar. Corp., 102 N. E. 346, 215 Mass. 96, 3 N. C. C. A. 612.

31. Simmons v. Heath Laundry Co., (1910), 3 B. W. C. C. 200.

32. Felsen v. Atchison, Topeka & Santa Fe R. R. Co., 3 Cal. I. A. C. 11.

33. Martin v. Mahoney Brothers, 2 Cal. I. A. C. 436.

34. Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 148 N. W. 684, 6 N. C. C. A. 807.

A night watchman, employed by several employers to watch their premises, was killed. It was held that he was employed by the employer on whose premises he was killed, but that his wages should be computed upon the wages received from all the employers.[35]

"Where the workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for each such employer, and at another time for another such employer, his average weekly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident."[36]

Where a workman has worked continuously for 3 years for the same employer, no account can be taken of wages earned by him under concurrent contracts with other employers.[37]

Regular employment of two nights a week constitutes continuous employment for the purpose of averaging the weekly earnings; and other wages earned from the same employer for irregular and uncertain employment are not to be taken into account in arriving at the average weekly earnings.[38]

In discussing this question in an Illinois case the court said: "The deceased, a motorman, was employed by the interurban company and wore its uniform. He was paid by the hour, and each pay day received from the paymaster of the interurban company his pay in a check for the amount earned on the lines of the interurban company and in cash inclosed in a sealed envelope for the amount earned on the lines of the city railway company. He received as wages for the year preceding his death $1,067.21—$773.64 from the interurban company, and $293.57 from the city railway company. The award made was for $3,500

35. Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 Pac. 491, 13 N. C. C. A. 544.

36. Lloyd v. Midland Ry. Co., (1914), 7 B. W. C. C. 72; Brandy v. Owners of S. S. "Raphael," (1910), 4 B. W. C. C. 6, Aff'd in 4 B. W. C. C. 307 (1911).

37. Buckley v. London & India Docks, (1909), 127 L. T. J. 521, 2 B. W. C. C. 327.

38. Hathaway v. Argus Printing Co., (1900), 3 W. C. C. 177.

payable in semimonthly installments, while the plaintiff in error claims it should have been for $3,094.56 only, being four times the amount of wages received from it, and that the amount received from the city railway company should not be taken into account.

"The deceased left a widow and children, in which case section 7 of the Illinois Workmen's Compensation Act provides that the amount of compensation shall be four times the annual earnings of the employee but not less than $1,650, nor more than $3,500. (Amended in 1921 so as to make the maximum $4250). Section 10 provides that the compensation shall be computed on the basis of the annual earnings which the injured person received as salary, wages, earnings, if in the employment of the same employer continously during the year next preceding the injury. It is the contention of the plaintiff in error that the deceased, while operating its cars over the lines of the city railway company, was in the employ of that company, and that the wages earned in that emloyment cannot be regarded as part of the annual earnings which he received as salary, wages, or earnings in the employ of the same employer continously during the year preceding his death. The deceased had but one contract of employment, and that was with the plaintiff in error. Under this contract he operated the cars of the plaintiff in error as a motorman, whether on its own tracts or those of the city railway company. He was not a party to the contract between the two companies, though it may be assumed that he had notice that the tracks north of 119th street were a part of the system of the Chicago City Railway Company, and that that company paid his wages, and those of the other motormen, conductors, and employees of the interurban company, for the time they were operating cars north of 119th street. This, however, did not alter his relation to the interurban company. It was still his employer, and he was its employee. When he crossed 119th street to the north he did so by reason of his employment by the plaintiff in error, and he operated its cars by reason of the same employment, though for the benefit and under the control of the city railway company. He had no contract of employment with the city railway company. The contract between the two companies required

the interurban cars, while upon the lines of the city railway company, to be operated by the employees of that company at its own expense. This was not done, but the city railway company permitted the cars to be operated under its control by the employees of the interurban company, whom it paid in the manner which has been stated." The award should be affirmed.[39]

An employee who has worked at different employments throughout the year is to be compensated upon the basis of the wages received from the employment he was engaged in at the time of the accident.[40]

§ 448. **Where Weekly Wage Exceeds Statutory Amount.**— Where the evidence disclosed that at the time of his death deceased was making about $5 a day, the board made an award on the theory that the everage weekly wage of an employee, according to section 40 of the compensation act, cannot for the purpose of computing compensation, be considered to be more than $24.00.

By section 37 of the Indiana Workmen's Compensation Act it is provided that—

"If the employee leaves dependents only partially dependent upon his earnings for support at the time of the injury, the weekly compensation to those dependents shall, in addition to burial expenses, not to exceed one hundred dollars, be in the same proportion to the weekly compensation for persons wholly dependent as the amount contributed by the deceased employee to such partial dependent bears to his annual earnings at the time of the injury."

"The weekly compensation for persons wholly dependent, when the average weekly wage amounts to $24 per week or more, is $13.20. Appellee was a partial dependent, and was receiving $15 a week from the deceased, which is five-eighths of the maximum weekly wage of $24, as fixed by said section 40. Under this section the annual earnings of the deceased was $1,248, instead of $1,560, as claimed by appellant. The amount of the award as

39. Chicago & Interurban Traction Co. v. Indus. Bd., 118 N. E. 464, 282 Ill. 230, 1 W. C. L. J. 518.

40. Minniece v. Terry Bros. Co., 179 App. Div. 949, 223 N. Y. 570, 119 N. E. 1060.

fixed by the board is supported by the evidence and is according to law."[41]

Under the Minnesota Act the maximum amount of compensation payable weekly to dependents in 1918 in case of death was $11; and future installments do not bear interest.[42] The maximum was made $15 by the amendment of 1919.

§ 449. **Where the Union Scale Paid by Other Employers is Higher.**—A stamper was employed at $15 a week. The Union scale as well as the prevailing rate of wages for this kind of work was $22 a week. Claimant had been employed at various jobs during the year including one month as a stamper for another employer. The commission certified the facts to the appellate division to determine whether compensation should be determined according to the salary of a workman in the same class of work for the defendant or whether it should be determined on the wages of employees in the same class of work in other shops. In refusing to determine the question the court said: "From the evidence submitted to it the commission is to determine the average daily wage which an employee of the same class as claimant, working substantially the whole of such preceding year, in the same or similar employment, in the same or neighboring place, shall have earned in such employment during the days when so employed. The claimant, when injured, was a stamper, and the basis of his compensation is the prevailing wages of a stamper in the same class, as stated in the section. Hence, it is for the commission to determine whether, under the circumstances applying to this or a neighboring place, the claimant is in the class of workmen who are receiving twenty-two dollars a week, or in a class only receiving fifteen dollars to seventeen dollars a week. * * * We cannot upon the record now before us, pass upon those questions as matter of law."[43]

41. Gen. American Tank Car Corporation v. Borchardt, —Ind. App. —, (1919), 122 N. E. 433, 3 W. C. L. J. 700.

42. State ex rel. Johnson Hardware Co. v. District Court of Carver County, —Minn.—, (1920), 177 N. W. 644, 6 W. C. L. J. 189.

43. Adams v. Boorum & Pease Co., 179 App. Div. 412, 166 N. Y. S. 97, 15 N. C. C. A. 1022.

§ 450. **National Guardsman.**—Where the only earnings received by a national guardsman while in service was less than the minimum allowed by the statute, it was held that he was entitled to the minimum award. The guardsman when not with the milita received $4.50 a day in his regular employment.[44]

Where the only evidence of the amount of income of a national guard, who was injured during target practice, was his salary from a telephone company, compensation was computed on that basis. [45]

Where a second lieutenant of militia was injured while serving upon an occasion when he received no pay, but during regular service received $1,700 per annum, it was held, prior to the amendment of section 2099 of the Political Code of California in 1915, that he should be awarded compensation on the basis of his regular pay.[46]

§ 451. **Judicial Notice.**—In proceedings for compensation the committee of arbitration and the industrial accident board may act upon their own knowledge in determining the amount which can be earned by a day laborer, where no evidence has been introduced on such question. [47]

Under the Connecticut Act the Commissioner held that he could take judicial notice of the value of board, from the statements as to the nature of the board and what was furnished and the appearance of the parties with whom the workman boarded, where there was no agreement regarding the value of the board. [48]

§ 452. **Partial Disability Award.**—Where an employee has been injured and partial disability results, the award should be based upon the difference between the earning capacity prior to the injury and the earning capacity of claimant subsequent to the injury. The award should not be based upon the

44. Peyerson v. State of California, 2 Cal. I. A. C. 58.
45. Wallace v. National Guard of Cal., 3 Cal. I. A. C. 94.
46. White v. National Guard, State of Cal., (1916), 3 Cal. I. A. C. 287.
47. In re Walsh, 227 Mass. 351, 15 N. C. C. A. 345, 116 N. E. 496.
48. Wallack v. Sorensen, 1 Conn. Comp. Dec. 197.

wages actually earned since the accident. The court said: "The claimant earned nothing during the period covered by the award, but the statute in such a case makes the compensation, not 66⅔ per centum of the difference between his former and subsequent wages, but 66⅔ per centum of the difference between his former average weekly wages and 'his wage-earning capacity thereafter in the same employment or otherwise.' He may have had a 'wage-earning capacity' during the period covered by this award. That period was nearly 2 years after the accident. Within 2 weeks after the award he was working. Perhaps he was able to do so at the time of the award. No testimony was taken on this point, and the award is unsupported. The commission should determine the wage-earning capacity of the claimant, and not base the award alone on actual wages received since the accident."[49]

In determining the amount of compensation to which an employee, who has been partially disabled, is entitled, his average weekly wages since the injury is a factor to be considered, but not the wages he has been able to earn since the injury.[50]

In cases of partial disability awards where a certain percentage of the difference between the average wages before and after the injury is allowed, based on a loss of earning power due to the injury, the workman will not be permitted to profit by a business depression which temporarily reduces the wages and thus enlarges the difference between his earnings before and after the injury and consequently enlarges the award. In a case where an employee's average weekly wages were $22 prior to the injury and the evidence showed that the employee was able to earn $15 a week notwithstanding his injuries but because of business depression he was able to earn only $13.20, the court said: "In the case at bar there is a specific finding that the employee is now earning $13.20, instead of $15, because of dullness in trade.

49. In re Behrens, 188 N. Y. App. Div. 66, (1919), 176 N. Y. Supp. 28, 4 W. C. L. J. 282.

50. Miller v. S. Fair & Sons, 206 Mich. 360, (1919), 171 N. W. 380, 3 W. C. L. J. 752.

This is equivalent to a finding that his inability to earn $15 a week is caused not by his incapacity or his injury, but solely because of business conditions.'"[51]

. Where prior to his injury an employee had been working 11 hours per day, with time and one-half for the three hours overtime, and after the injury, worked 10 hours per day, his compensation should be allowed on a comparison of an 8 hour day's earning in each employment.[52]

In computing compensation for partial disability under the Texas Act, the proper method is to limit 60 per cent of the average weekly wages to $15 per week and fix the compensation by multiplying this 60 per cent by the percentage of disability, and not by multiplying 60 per cent of the average wage, by the percentage of disability, limiting the compensation to $15 per week.[53]

§ 453. **Commissions.**—The fact that an employee's wages are paid in the form of commissions is immaterial as long as the amount can be ascertained.[54]

§ 454. **Evidence.**—Where an employee worked only 45 days at the employment in which he was injured and an award of $20 per week for permanent loss of use of his hand was made, it having been shown that his wages exceeded $30 per week, and evidence of the wages of other men in the same line of work during the previous year was introduced, and the defendant offered no evidence as to the probability of improvement in the condition of the hand, it was held that the award was warranted by the evidence.[55]

51. In re Durney, 222 Mass. 461, 111 N. E. 166, 11 N. C. C. A. 668; Capone's Case, — Mass. —, 132 N. E. 32.

52. In re Nicola Ciatter, 3rd A. R. U: S. C. C. 153.

53. Western Indemnity Co. v. Milan, — Tex. Civ. App. —, (1921), 230 S. W. 825.

54. Larke v. John Hancock Mutual Life Ins. Co., 90 Conn. 303, 97 Atl. 320, 12 N. C. C. A. 308.

55. Shaw v. American Body Co., 189 N. Y. App. Div. 365, 178 N. Y. Supp. 369, 5 W. C. L. J. 112.

Where the evidence showed the wages of the injured employee were $5.60 per day for 250 days in the year, and the commission awarded $7 per week for 413 weeks for permanent partial disability, the court held that there was sufficient evidence upon which to base an award.[56]

An award based upon the probable future earning capacity of $18 per week of a minor cannot be sustained, where the evidence showed that prior to the injury the employee was physically unfit for heavy work and that he never would be able to earn over $15 per week.[57]

An injured employee had been at work only one day when injured, and the petition alleged no facts by which the average weekly wage could be computed. The petition was not objected to by the defendant. The act provides that in a case of this kind, compensation is to be based on the average weekly amount, which, during the 12 months previous, was earned by a person in the same grade or class of employment in the district where the plaintiff was employed. The court said: "We think the testimony of defendant's foreman as to the customary prices for labor in that kind of employment for a year or more, which he said ranged from $1.75 to $2 a day in the same line or class of employment, was sufficient evidence of the average wages paid in the same grade and class of employment for the previous year."[58]

A letter written by an authorized agent of the master stating that the injured employee's wages were $11.94 per week, is sufficient evidence to justify an award based upon that sum, where there was additional evidence showing that he worked seven days a week at $1.75 per day.[59]

Where the evidence showed that the amount stated in an agreement between the employer and employee as to the an-

56. O. W. Rosenthal Co. v. Indus. Comm., 290 Ill. 323, (1919), 125 N. E. 250, 5 W. C. L. J. 196.

57. Markowitz v. Watters Laboratories, 191 N. Y. App. Div. 267, 181 N. Y. S. 17, 5 W. C. L. J. 882.

58. Sillix v. Armour & Co., 99 Kan. 103, 160 Pac. 1021, 15 N. C. C. A. 1032.

59. Conners v. Public Service Elect. Co., 89 N. J. L. 99, 97 Atl. 792, 16 N. C. C. A. 803.

ployee's wages was grossly inadequate, such agreement was ineffective and could not properly be approved.[60]

§ 455. **Construction of the Term Average Amount Contributed Weekly.**—The words "average amount contributed weekly," as used in the workmen's compensation act, are used in their ordinary, and not a technical sense, and mean the amount actual, so that where a deceased employee, whose average weekly wage was more than $24.00 contributed all his earnings during the year, about $800.00, to his parents, his partial dependents up to the time of the injury, the award to them should have been measured by the average amount actually contributed, ascertainable from his contribution, and not by a percentage of the average weekly wage.[61]

60. In re Cohen, (1916), 176 App. Div. 35, 162 N. Y. S. 424.
Note: See Chapter on Evidence, page 1351.
61. Indian Creek Coal & Mining Co. v. Kutter, 128 N. E. 763, (1920) — Ind. —, 7 W. C. L. J. 44.

CHAPTER X

INSURANCE OF COMPENSATION RISKS.

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§ 456. **General.**—The insurance of Workmen's Compensation risks, has with the exception of four states,[62] and one territory,[63] become a fixed American policy. Since compensation payments often cover a period of years, it is entirely proper that the disabled employee should thus be protected from the business reverses that may befall his employer.

While, with the exception above noted insurance in some form is made compulsory, (subject to the employer's choice to be sued for damages at common law with his common law defenses removed) what is known as self insurance is also permitted in thirty-two states.[64] It is usually required that before an employer is permitted to carry his own risk, he must satisfy the compensation commission or board of his financial ability to do so. Self insurance should not be confused with accident insurance which the employee may carry and has no bearing upon the right to compensation benefits.[65]

62. Alabama, Kansas, Louisiana, Minnesota.

63. Alaska.

64. California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin.

65. Ross v. Erickson Construction Co., 89 Wash. 634, 155 Pac. 153.

An exclusive, state managed insurance fund system prevails in eight states,[66] in two[67] of which self insurance is also permitted.

Stock company, mutual and reciprocal or interindemnity insurance is permitted in the thirty-six states which do not have exclusive state fund insurance.

The acts of ten states[68] provide for an elective or competitive state-managed insurance fund which competes with the other forms of insurance.

Under the state fund system, exclusive as well as elective, the employer pays the premium assessed, by the state compensation commission or board, into a fund collected, managed and disbursed by such commission or board.

Much controversy, legal[69] and otherwise has centered about exclusive state-managed compensation insurance more commonly referred to as monopolistic state insurance. This controversy has arisen primarily out of the large amount of litigation resulting from personal injury claims under the common-law system under which the liability of the employer was too often uncertain, and the liability insurance companies that carried the risks, and often contested these doubtful claims gradually came to be regarded by injured workmen as their natural enemies, hence when the compensation systems were introduced they, in some states, sought to

66. Nevada, North Dakota, Ohio, Oregon, Porto Rico, Washington, West Virginia, Wyoming.

67. Ohio, West Virginia.

68. California, Colorado, Idaho, Maryland, Michigan, Missouri, Montana, New York, Pennsylvania, Utah.

69. State v. Employers Liability Assurance Corp., 95 Ohio St. 289, 116 N. E. 513; State v. United States Fidelity & Guaranty Co., — Ohio St. 117 N. E. 232; Thornton v. Duffy, — Ohio St. —, 124 N. E. 54; Affirmed, — U. S. —, 41 Sup. Ct. R. 137, 7 W. C. L. J. 179. Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 266; New York Central Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247; Scranton Leasing Co. v. Indus. Comm, — Utah —, 170 Pac. 976; Indus. Comm. v. Daly Mining Co., — Utah —, 172 Pac. 301.

avoid the reoccurrence of such possibilities by the establishment of the exclusive state fund, on the theory that disabled employees would thereby obtain prompt relief, the state board or commission would have no personal interest in withholding compensation benefits justly due the injured employee, insurance would thus be obtained by the employer at cost and it would therefore be no hardship upon the employer to pay larger compensation benefits to disabled employees than he could pay when he found it necessary to pay the large profits ascribed to the private insurers. It was further contended that since compensation insurance premiums are based upon the payroll, and the acts of all states fix a maximum weekly or monthly benefit for disabled employees, premiums paid on wages and wage increases above the maximum redound exclusively to the benefit of the insurance companies without any added benefit to the injured employee or employer, nor is there any sound economic reason why such increased premium should be exacted by the insurer when there is no increase in the disability benefits that would have to be paid in the case of such employees who earn in excess of the maximum wage considered under the compensation acts. Under the state fund system it is argued that such excess premiums go into the fund and eventually help the employer to obtain a lower rate, until the day shall come when a more economically sound and scientifically accurate system may be devised for computing compensation insurance premiums.

The opponents of state funds take the position that we are departing from our fundamental, American theories of government and are launching into state socialism when the state is permitted to compete in business enterprises with its citizens, that in view of the fact that compensation benefits are fixed and definite the excuse for contesting claims does not exist as it did under the common-law system, especially since penalties are provided in many acts for failure to pay promptly the compensation due the disabled workman; that the constant changes in political administrations are not conducive to intelligent or economical management of the highly technical and intricate business of conducting a sound insurance fund; that the state fund system is further wrong in theory because the board sits as judge, jury and defend-

ant when a compensation claim is prosecuted; that the necessity of all claims having to be first approved by the board or commission before payments can be made causes delays which are not experienced where the insurer or employer is permitted to make payments at once and receive the final approval of the board afterwards; that there is no sound reason under the compensation system, for the state to destroy the legitimate private business of hundreds of its citizens without appreciably increasing the common good.

Much might be said as to the respective merits of the various forms of compensation insurance from the standpoint of the employer and employee, but that subject is too incidentally related to come properly within the scope of this work. Suffice it to say that most of the acts provide for supervision of compensation insurers in regard to the matter of adequate reserves and in a growing number of states supervision as to rates based upon merit and experience rating.

§ 457. **Self Insurance.**—Under the provisions of the California Workman's Compensation Act, requiring an employer to secure payment of compensation in one of the specified ways, it was held that the discretion of the commission was not limited to a case where there was reasonable doubt of the employer's ability, since the purpose of the Act was to secure prompt payment. The court said: "Undoubtedly, this court would not so construe the statute as to give 'unbridled discretion to the commission.' We cannot say, however, from the record before us, that the Industrial Accident Commission abused its discretion when acting upon the applications of these petitioners. This record discloses the fact that petitioners are engaged in very extensive business operations of many sorts. These activities are only made possible by the employment of many persons. It is not improbable that casualties may occur within the near future and we cannot justly say that the security demanded is disproportionate to the reasonable probability that such unfortunate happenings may be more than a few. Payments of compensation usually extend over a considerable period of time, being frequently made weekly for 240 weeks. The liability of the employer is therefore cumulative, and may increase from year to year. As counsel for respondent well say:

'If an employer had one maximum liability a year for five years, he would, during the fifth year, be paying upon all five injuries, and his total liability to all claimants during that year would be in the neighborhood of $20,000, without allowance for any further injuries occurring in that year.'

"In view of the magnitude of the business of petitioners and the probability of frequent injuries to their employees, we cannot say that this record reveals an abuse of discretion on the part of the Industrial Accident Commission." The employer was granted a certificate to self insure on depositing $2,000 in Liberty bonds to secure the payment of compensation. [70]

The supreme court of New York in holding that the commission has no right to penalize an employer, by "revoking its consent to his self insurance for good cause shown," for merely contesting the order of the commission for commutation of an award, said: "The commission had power to revoke its consent for self-insurance 'for good cause shown.' Workmen's Compensation Law, section 50, subd. 3, as amended by chapter 622, Laws of 1916. It was not shown that the financial standing of the appellant was precarious, or that the securities deposited to protect the self-insurance were inadequate. Nor was any other ground proven or taken for cancellation, except the fact that the appellant dared to contest an order of the commission. Had the commission required further securities, or a further agreement, doubtless a failure of appellant to furnish either would have constituted 'good cause shown' for cancellation. This course was not followed. We think that good cause has not been shown for cancellation." [71]

While the New York Workmen's Compensation Law, as amended in 1917, provides that the commission may require an agreement on the part of the employer to pay any award computed under section 27, into the state fund as a condition of self insurance, such consent cannot be construed as to require submission to arbitrary and illegal orders of the commission. Therefore it was improper

70. Bank of Los Banos v. Indus. Comm., — Cal. —, (1919), 183, Pac. 538, 4 W. C. L. J. 587.

71. State Indus. Comm. v. Yonkers, R. Co., 186 N. Y. App. Div. 192, (1919), 173 N. Y. Supp. 858, 3 W. C. L. J. 512, 18 N. C. C. A. 576.

for the commission to require an employer, whose solvency was not questioned, to pay the present value of an award to a widow and childern of a deceased employee, since the provision contemplated such an order only in a special case and after notice. Where the financial stringency of the time would work an unusual hardship upon the employer such an order is improper.

Further if the provision of the statute authorized the commission to require self-insurers and mutual insurers, whose solvency was not doubted, to pay the present value of future installments under awards for death claims, it would be unconstitutional as discriminating against such insurers in favor of all others.[72]

The provision of the compensation act requiring an employer to secure the payment of compensation to his employee, is compulsory upon all employers. And where the employer chooses to carry his own insurance, it is within the discretion of the commission to determine whether or not he shall deposit security under the section of the act providing that an employer need not insure where he furnishes to the commission satisfactory proof of his financial ability to pay compensation direct to the injured employees.

The commission must proceed by mandamus to compel the employer to secure the payment of compensation, since it has no other adequate remedy, as it cannot sue for premiums where the employer has not elected under what provision it will be bound.[73]

Section 22 of the Ohio Act provides for self insurance where the employer abides by the rules of the State Liability Board of Awards and is of sufficient financial ability to render certain the payments of disability awards. Under this act quo warranto proceedings were instituted for the purpose of ousting an indemnity insurance company from writing, within the state, insurance to indemnify employers. The court held that the point determinative of the issue was the validity of section 22, which was claimed to be unconstitutional in that it contravened section 35 of the Ohio Constitution, authorizing the passage of a compulsory compensation

72. Sperduto v. New York City Interborough Ry. Co., 186 N. Y. App. Div. 145, (1919) 173 N. Y. S. 834, 3 W. C. L. J. 503.

73. Indus. Comm. v. Daley Mining Co., 51 Utah 602, 172 Pac. 301, 2 W. C. L. J. 156.

act, (2) because it violated Art. 1, Sec. 2, of the state constitution providing that "political power is inherent in the people," (3) because it was violative of the provision that all laws of a general nature shall have uniform operation throughout the state, (4) because it violated the Fourteenth Amendment of the Federal constitution forbidding any state to deny any person the equal protection of the laws. The court in overruling all the contentions said: "By the terms of this section the Industrial Commission retains and must exercise the most complete supervision over the award and payment of compensation by those who by permission of the commission are permitted to pay directly to injured or the dependents of killed employees. The employee is favored with the most complete guaranty that he will receive the same benefits he would have recieved, had his employer contributed to the state insurance fund. The underlying purpose of the compensation act is in no manner thwarted.

"Section 22 neither authorizes nor denies the right of employers to enter into indemnity contracts to protect them from loss or damage from injury to employees and we cannot see how any injured employee, or the dependent of any killed employee, is compelled to rely upon an insurance indemnity company to secure their compensation, or to have any relation whatever with such companies. If an injured employee elects to avail himself of the provisions of the workman's compensation act, the law protects just as amply the employee of a noncontributing employer as the employee of one who has contributed to the fund. The court is of opinion that section 22 violates neither of the 'equality before the law' sections of the Constitution.

"The classification effectuated by this section is one of employers rather than of employees, although it must be admitted that employees, without having any voice in the matter, are by virtue of the election of their employers necessarily also classified."[74]

An employer having furnished satisfactory proof of its financial ability to pay compensation, and having deposited securities to assure its liability to pay the same, does not obtain any immunity or

74. State ex rel. Turner v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 96 Ohio St. 250, 117 N E. 232, 15 N. C. C. A. 765.

exemption from liability for the payment of such compensation under the New York Statute.[75]

All employers under the New York act are subject to the same procedure for determining claims, no matter what form of insurance they carry nor the means they adopt to secure payment to employees, and enjoy the same rights and privileges.[76]

The requirement that an employer furnish satisfactory proof of his financial ability to pay compensation and to deposit securities is within the limits of permissible regulation.[77]

The workmen's compensation law of Ohio, originally permitted employers to pay compensation directly instead of contributing to the state insurance fund. The amendment of 1917, required the commission to withdraw that privilege from an employer who insured himself against his liability under the act. It was held that this did not deprive an employer, who had already, entered into a contract for such insurance, of his property, nor did it impair the obligation of a contract in violation of the constitution.[78]

Section 27 of the New York Act, which requires the self insurer to deposit money to meet future payments of an award, formerly did not apply to an award made to a widow because there was no provision in the section for the contingency of the widow's remarriage.[79]

§ 458. **Nature of Policies permitted and Liability of Holder.**— The acts usually set out a few of the more general requirements

75. Kenny v. Union Railway Co., 166 App. Div. 497, 152 N. Y. Supp. 117, 8 N. C. C. A. 986.

76. McQueeny v. Sutphen & Myer, 167 N. Y. App. Div. 528, 153 N. Y. Supp. 554, 11 N. C. C. A. 326; Winfield v. N. Y. C. & H. R. R. Co., 168 App. Div. 351, 153 N. Y. S. 499; Connors v. Semet Solvay Co, 94 Misc. 505, 159 N. Y. S. 431; Post v. Burgess & Gohlke, 54 N. Y. L. J. 1493. 216 N. Y. 544, 10 N. C. C. A. 888; Utah Copper Co. v. Indus. Comm. of Utah, — Utah —, 193 Pac. 24, 7 W. C. L. J. 147.

77. N. Y. C. R. R. Co. v. White, 243 U. S. 188, 208.

78. Thornton v. Duffy et al., (1920), 41 Sup. Ct. R. 137, 7 W. C. L. J. 179.

79. Adams v. N. Y. O. & W. Ry. Co., 220 N. Y. App. Div. 579, 114 N. E. 1046, B 1 W. C. L. J. 1174.

and provisions of compensation insurance policies but leave the detailed requirements of the policies to the discretion of the state superintendent of insurance or to the board or commission.

In proceedings in *quo warranto* to oust an insurance company from exercising its franchise of writing indemnity insurance, it was held that section 54 of the Ohio act of Feb. 26, 1913, did not conflict with nor repeal the statute (Ohio G., C., Par. 9510), but declared and limited the nature and extent of the indemnity that might be written thereunder, which the court defined as follows: "(a) Every such contract of indemnity of an employer for loss or damage on account of injury of an employee by accidental means or on account of the negligence of such employer or such employer's officer, agent, or servant shall contain a specific provision, as a part of its terms, for the payment to such injured employee 'of such amounts for medical, nurse and hospital services and medicines, and such compensation as is provided by this act for injured employees; and in the event of death shall pay such amounts as are herein provided for funeral expenses and for compensation to the dependents of those partially dependent upon such employee.' This provision of the contract has reference only to cases of injury where the injured employee elects to accept compensation for his injury directly from his employer according to the standard fixed in section 22 of the Industrial Commission Act.

"(b) The contract of indemnity shall not contain any agreement to indemnify an employer for any civil liability for or on account of the injury to his employee by the wilful act of such employer, or any such employer's officers or agents, or the failure of such employer, his officers or agents, to observe any lawful requirements for the safety of employees. This provision of the contract has exclusive reference to cases of injury where the injured employee does not elect to receive as compensation for his injury either the judgment or award of the Industrial Commission sitting as a board of awards, or from his employer direct, but elects to and does exercise the right to enforce his cause of action against his employer in the courts.

"(c) No contract of indemnity shall be written in behalf of an employer of five or more employees for loss or damage, nor an

agreement to indemnify an employer for any civil liability, on account of an injury of an employee by accidental means or on account of the negligence of such employer, his officers, agents, or servants, whether the negligence be that of the wilful act, or failure to comply with lawful requirements of the safety of employees, or negligence of any other kind or character, if such employer is not a contributor to the compensation fund, or has not legally exercised the option of carrying his own insurance under section 22 of the act."[80]

Where an employer secured insurance upon all of his employees, and at the time of taking out the insurance both the employer and insurance carrier were of the opinion that employees in different work in a different county were not covered, thinking that no insurance was required for these employees, the insurance carrier could recover from the employer any compensation paid pursuant to an order of the industrial commission for the death of an employee in that line of work which was not in the contemplation of the parties at the time of writing the insurance, for the insurance carrier is only a surety in these circumstances and is answerable to the employees deemed by the industrial commission to come under the protection of the policy, only to the extent to which the employer is unable to meet the award, and the employer could not take advantage of the policy clause permitting adjustment of premium for new risk by pleading willingness to pay the increased premium.

There is no reason why a party having separate and distinct occupations, both of which require insurance under the compensation act, could not take out two policies, each covering one of them and not the other.[81]

A contract between an employer and an insurance carrier can in no way limit the scope of an insurance policy under the Massachusetts Act.[82]

80. State ex rel. Turner v. Employer's Liab. Assur. Corp., Ltd., 95 Ohio St. 289, 116 N. E. 513, 15 N. C. C. A. 768.

81. United States Fidelity & Guar. Co. v. Taylor, 132 Md. 511, 104 Atl. 171, 2 W. C. L. J. 794.

82. In re Cox, 225 Mass. 220, 114 N. E. 281.

An employer cannot under the Ohio Act, protect himself, by an indemnifying policy, from the burden imposed by the provision of the Workmen's Compensation Act, requiring him to insure his employee against loss from injury sustained in the course of his employment, without regard for the negligence of the employee.[83]

Since an insurance policy can in no way enlarge or restrict the rights given under the compensation act, where it was found that the claimant was not an employee and the decision on the claim was in defendant's favor, it cannot be said that the award denying compensation, was obtained through fraud, because in writing the policy the insurer had represented that the policy covered the claimant.[84]

The Supreme Court of Texas in determining the liability of reciprocal or interindemnity insurance policy holders held that since their policies and applications stated that in addition to the premium paid on their policies they were not to be held liable for any amount in excess of the premium paid for their policy, it was not to be presumed that the purpose of such clause in the policy was to enlarge that liability and it would not be so construed, neither could the policy holders be held liable as partners. "There was no joint undertaking, no common business. The business of the association was intimate to only those who as members composed it. The policies of insurance were not issuable to the public."

It was held however that as to third persons the members of the association were liable for the expense of the association such as salary of the manager, stationery, etc., just as others who dealt through an agent were liable, but as to liability to each other for losses incurred there was none in addition to the amount expressly limited by their policies.[85]

83. Frank C. Thornton v. Thomas J. Duffy, 65 L. Ed. 164, 41 Sup. Ct. R. 137, 7 W. C. L. J. 179; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. Ed. 685, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927.

84. Porter v. Indus. Comm.; Wisconsin State Register Co. v. Same, — Wis. —, (1921), 181 N. W. 317.

85. Sergeant v. Goldsmith Dry Goods Co., — Tex. —, 221 S. W. 261.

The Mutual Insurance Act of Illinois (Laws of 1915, p. 485) section 15, provides as follows: "No such corporation shall issue any insurance policy for a cash premium and without contingent liability until and unless it possesses surplus of at least one hundred thousand dollars and not less in amount than the capital required of domestic stock insurance companies transacting the same kind of business."

This Act has been adopted as a uniform statute in substantially the form it appears on the statute books of Illinois in more than twenty states.

The Supreme Court of Illinois in construing this act held that the provisions as to cash policies without contingent liability were applicable to all corporations organized under said act, or to companies previously organized under other statutes of the state of Illinois which expressly adopted said act by resolution of the Board of Directors as provided by Section 22 of the Act.[86]

The right of mutual insurance corporations generally to provide for insurance by cash premiums payable in advance, has been uniformly upheld by the courts, and recission and withdrawal of the policy or certificate in a mutual company will, where the agreement is complete terminate the contract and release the member from subsequently accruing liability to assessments but such recission must be based upon some right reserved under the charter, by-laws, or certificate itself, or must rest upon some statute or arise from the mutual consent of the parties.[87]

86. Integrity Mutual Insurance Company v. Boys, 293 Ill. 307.

87. Union Ins. Co. v. Hoge, 21 How. (N. S.) 35; Ohio Mutual Ins. Co. v. Marietta Woolen Factory, 3 O. C., 348; Mygatt v. Insurance Co., 21 N. Y. 52; White v. Havens, 4 Abb. Court of App. Dec. (N. Y). 582; Mother of Mutual Fire Ins. Co., 164 N. Y. 10; Spruance v. Ins. Co, 9 Colo. 73, 10 Pac. 285; Schimpf v. Lehigh Valley Mutual Ins. Co., 86 Pa. 373; Lycoming Fire Ins. Co. v. Commonwealth, 10 Weekly Notes on Cas. 228; Given v. Rettew, 162 Pac. 638, 29 Atl. 703; State v. Mfgrs. M. F. Ins. Co., 91 Mo. 311; In re Minneapolis Mut. Fire Ins. Co., 49 Minn. 291; Patrons of Industry Fire Ins. Co. v. Harwood, 72 N. Y. Supp. 8, 64 App. Div. 248.

§ 459. **Extraterritorial Coverage.**—An employer doing a grain commission business secured a policy of insurance, the schedule stating the address of the assured, the duration of the risk, and the location of all the places where business operations were to be conducted, namely Duluth and Minneapolis. After designating the different classes of employees covered, the policy stated that it included the designated employees "wherever they may be in the service of the assured." An employee was killed in North Dakota. Holding that the policy covered this employee, the court said: "The description in the schedule is general in terms. It contains no express territorial limitation of liability, but it does refer to men traveling in Minnesota under the heading quoted. The parties had in mind indemnity for liability arising under the Workmen's Compensation Act. This act applies to accidents outside the state in connection with business done in the state and incident to its conduct. In response to this schedule, if it be considered a proposal for insurance, and this is altogether favorable to the relator, the company issued a policy from which we have quoted above. In that policy it assumed to give indemnity for injuries to or the death of men of the class to which Chamber (the deceased employee) belonged 'whose wages are included in the estimated pay roll on which the premium of this policy is based wherever they may be in the service of the assured and while engaged in the trade or business described in the schedule.' Chamber's wages were included in the estimated pay roll. There is no ambiguity in the policy. If there is any anywhere, it comes when the policy and schedule are put together. * * * The insurance company signed and issued the policy, containing the promise of indemnity quoted. It cannot now avoid liability because of the description in the schedule."[88]

Where an insurance policy purports to cover employees working on certain premises, also purports to cover them under the

88. State ex rel. London & L. Indemnity Co. of America v. District Court of Hennepin Co., 141 Minn. 348, 170 N. W. 218, (1919), 18 N. C. C. A. 575.

Nebraska Compensation Act, and the insurance carrier accepts premiums, it is estopped to deny liability to injured employees on a plea that the premises described are located in Iowa, and that it did not insure against accidents occurring outside of the state.[89]

§ 460. **When Contract for Insurance is Consummated.**—Where an employer applied for insurance and a counter offer was made by the Insurance Company, a finding that the employer had accepted the counter proposal will not be allowed to stand where such finding was based upon mere conjecture. Furthermore an agent without special authority cannot bind his principal in this regard by parol agreement.[90]

§ 461. **Coverage.**—Where an insurer issued a policy expressly excepting certain classes of work from the protection of the policy, the industrial commission is without power to make a new contract between an employer and the insurance carrier and an employee injured while performing this particular excepted work cannot look to the insurance carrier for compensation. While the employee need not necessarily be at the specified work at all times, still the work he is performing must be incident to that work and not such work as it expressly excluded.[91]

Where an insurance policy covered employees engaged in general farm work, excluding the operation of farm machinery, and an employee engaged in holding a lantern for the engineer of a tractor was struck, by a harrow pulled by the tractor, and knocked down, sustaining injuries, the court, in holding that he was not within the excluded class but was protected by the policy, said:

89. Venuto v. Carter Lake Club, — Neb. —, (1920), 178 N. W. 760, 6 W. C. L. J. 544; Home Life & Acc. Co. v. Orchard, — Tex. Civ. App. —, (1921), 227 S. W. 705.

Note—See Section 45.

90. Western Indem. Co. v. Indus. Acc. Comm., — Cal. —, (1920), 190 Pac. 27, 6 W. C. L. J. 256.

91. Worswick Street Paving Co. v. Indus. Acc. Comm., — Cal. —, (1919), 185 Pac. 953, 5 W. C. L. J. 342; Hungerford v. Bonn, 183 N. Y. App. Div. 818, 171 N. Y. S. 280. 18 N. C. C. A. 572.

"If, in view of the particular facts of this case, the phrase 'general farm work, excluding the operation of farm machinery,' is of uncertain import, then, in resolving such uncertainty, we are to be guided by the rule that in such a case the contract is to be interpreted most strongly against the party who caused the uncertainty to exist. Civ. Code, Par. 1654. This policy was drawn by the insurer. It caused the uncertainty to exist. It is obvious that the purpose of inserting the exception was to avoid the risks incidental to the operation of machinery, and not to avoid risks incident to ordinary farm work. We think, therefore, that the meaning of the phrase should be restricted so that it would include those who were actually engaged upon the machine, and not those who were assisting in general operations for which the machine furnished only the motive power. Giving it this meaning, it will be seen that it does not include the work upon which Dobson was engaged, and that he was not within the exception."[92]

"The claimant was the general manager, secretary, and treasurer of that company; as general manager he received $100 a month, and additional salaries for performing the duties of his other offices in the company, if the company made profit enough out of the business to pay the same. He owned 1,950 shares out of 2,300 shares of the stock, approximately 85 per cent. Par value of stock was $10 a share. As general manager he did labor in and about the plant, repairing wires, apparatus, and generally was depended upon to keep the plant going and producing the product in which it dealt. On December 1, 1918, he had repaired a gas producer, and was standing on a coal hopper about three feet above the gas producer, reaching up to put an electric light bulb in the socket, when he received a shock from the electricity and fell over backwards; he struck on the stem of the safety valve of the producer, which projected about three inches; it pierced the back near the tenth dorsal vertabra, fractured the spinous process of the vertebra, punctured the left lung, and produced complete paralysis. The corporation paid the Utilities Mutual Insurance

92. Maryland Casualty Co. v. Indus. Acc. Comm., 178 Cal. 491, 173 Pac. 993, 18 N. C. C. A. 569, 2 W. C. L. J. 616.

Company, the carrier and appellant herein, for compensation insurance on the claimant as general manager only.

"The appellant urges that, under the ruling in Bowne v. Bowne, 221 N. Y. 28, 116 N. E. 364; Howard v. Howard, 221 N. Y. 605, 117 N. E. 1072; Sharlow v. Sharlow Bros. Co., 181 App. Div. 963, 168 N. Y. Supp. 1130, and Kennedy v. Kennedy Mfg. Co., 177 App. Div. 56, 163 N. Y. Supp. 944, reversed on reargument 182 App. Div. 907, 168 N. Y. Supp. 1114, the respondent is not entitled to the award. The decisions on all subsequent appeals were based upon Bowne v. Bowne, 221 N. Y. 28, 116 N. E. 364. Chapter 622 of the Laws of 1916 amended the Workman's Compensation Law (Consol. Laws, c. 67) by adding subdivision 6 to section 54, which reads as follows:

'Any insurance carrier may issue policies, including with employees, employers who perform labor incidental to their occupations, such policies insuring to such employers the same compensations provided for their employees, and at the same rates: Provided, however, that the estimation of their wages values, respectively, shall be reasonable and separately stated in and added to the valuation of their pay rolls upon which their premium is computed. The employer so insured shall have the same rights and remedies given an employee by this chapter.'

"This amendment to the law took effect in May, 1916, it is in effect permissive, and contemplates future action; it is not retroactive. The claimant in Bowne v. Bowne, 221 N. Y. 28, 116 N. E. 364, met with his accident March 6, 1916. He was not protected by the provision of subdivision 6, section 54. The decision in the Court of Appeals was rendered in May, 1917. Howard v. Howard, 221 N. Y. 605, 117 N. E. 1072, was decided in July, 1917, reversing 176 App. Div. 940, 162 N. Y. Supp. 1124, which was argued in the Appellate Division in January, 1917. We cannot find in the records on appeals in the last-cited cases the dates of the accidents; the amendment is not referred to in either of the opinions or memorandums handed down; it is reasonable to conclude that the accident occured prior to May, 1916. The accident in Kennedy v. Kennedy Mfg. & Engineering Co., 177 App. Div. 56, 163 N. Y. Supp. 944, must have occurred before May, 1916, as the award

ward appealed from in that case was made May 25, 1916; the award was affirmed; on a reargument (182 App. Div. 907, 168 N. Y. Supp. 1114) the award was reversed, on authority of Bowne v. Bowne and Howard v. Howard, supra.

"Sharlow v. Sharlow Bros. Co., 181 App. Div. 963, 168 N. Y. Supp. 1130, was decided by this court in December 1917; no opinion was handed down, and date of accident does not appear in the report. The brief of appellant says the accident occurred March 29, 1917; that would be nine or ten months after the amendment to section 54 took effect. The decision in this case was based upon and followed Bowne v. Bowne, supra, where the accident occurred before May, 1916, when the amendment took effect.

"It should appear, however, that in Sharlow v. Sharlow Bros., supra, the salary of the injured employee, who was a stockholder and officer, was included by the employer company in the pay roll, and the premium to be paid was based upon that pay roll, and it was contended by the Attorney General that that fact brought the case within subdivision 6 of section 54; while the insurer claimed and urged that the intent of the employer alone was not controlling, but that the subdivision contemplated an act by the insurer as well as the insured—that the policy should show a joint contemplation of the parties to the contract of insurance, embracing the employer and the officer therein. It was therefore considered that the case did not come within the subdivision, and was controlled by Bowne v. Bowne, supra.

"If this amendment means anything, it covers the claimant on this appeal, providing the commission has found the following question or questions of fact in his favor, viz: That the estimation of his wage value was reasonable, and separately stated in and added to the valuation of the pay roll of the corporation upon which the whole premium was computed. The record sustains the finding of the commission on these questions, and, under section 54, subd. 6, and section 23, of the Workmen's Compensation Law, the award should be affirmed. All concur." [93]

93. Hubbs v. Addison Electric Light & Power Co., 191 App. Div. 765, (1920), 182 N. Y. S. 152; Kolpein v. O'Donnell Lbr. Co., 191 App. Div. 764, 182 N. Y. S. 155, (1920), 6 W. C. L. J. 204. See Section 21 Who are employees.

Where an employer gave the number of his employees as 35 and his business logging, and he also conducted a farm, and one of his farm employees, who had no connection with the logging work, was injured, it was held that the farm employee was not covered by the employer's compensation policy. The court said:

"We think a fair construction of the language of the policy, read in connection with the acceptance of the compensation act by Messner, excludes the idea that it covered the work in which deceased was engaged at the time of his death." [94]

In a California case the court said: "On the whole therefore the contract of employment in violation of the child labor law was illegal and not included in the policy of insurance (Mt. Vernon Co. v. Frankfort Co., 111 Md. 561, 75 Atl. 105, 134 Am. St. Rep. 636) and, there being no waiver or estoppel, the petitonier is not liable under the policy for the accident in question." [95]

§ 462. **Liability of Principal Contractor for Compensation to Employees of Subcontractor.**—Under the Illinois Act, providing that a principal contractor is liable where he does not require a subcontractor to procure insurance the court in construing this provision said: "The word 'require,' as used in this section, is not used in the sense contended for by plaintiff in error. By this section it becomes the duty of the principal contractor to see to it that his sub-contractor insures his liability to pay the compensation provided by the act or become liable himself to pay such compensation. Under the statute the principal contractor is made primarily liable for all injuries received by the employees of his sub-contractor, and he can only escape this liability by requiring his subcontractor to insure his liability as provided by section 31. Knowing that he is thus liable unless he takes this precaution, the principal contractor must either see to it that the sub-contractor insures his liability or stand ready to pay any compensation that

94. Kauri v. Messner, 198 Mich. 126, 164 N. W. 537, 17 N. C. C. A. 466; Anderson v. McVannell, 201 Mich. 29, 167 N. W. 860, 2 W. C. L. J. 285, 17 N. C. C. A. 467; Bayer v. Bayer, 191 Mich. 423, 158 N. W. 109, 17 N. C. C. A. 467.

95. Maryland Cas. Co. v. Indus. Acc. C., — Cal. —, 178 Pac. 858, 3 W. C. L. J. 563.

may be awarded on account of an injury to an employee of the sub-contractor. By making it a part of his contract with the sub-contractor the principal contractor can require him to take out this insurance as easily and effectively as he can require him to perform any other provision of the contract between them. The statute contemplates an absolute requirement on the part of the principal contractor, and it is not complied with by a mere demand. The principal contractor can escape liability only in case his sub-contractor insures his liability as is provided by this section."[96] But this does not apply where the principal contractor is an eleemosynary institution, not engaged in an extrahazardous employment.[97]

Under the California Act the owner of oil wells cannot be held liable for an injury to an employee of an independent contractor engaged in pumping wells.[98]

The same rule is followed in most other states unless an express provision to the contrary is contained in the act.[99]

Under the Massachusetts Act, if a subscriber enters into a contract with an independent contractor to do the subscriber's work, and the Massachusetts Employees Insurance Associatoin would, if the work were performed by the subscriber's immediate employees, be liable, the association will likewise be liable for com-

96. Main Case, Butler Street Fdry. & Iron Co. v. Indus. Bd., 277 Ill. 70, 115 N. E. 122, 15 N. C. C. A. 486; City of Chicago v. Indus. Comm., — Ill. —, 129 N. E. 112, (1920).

97. Lombard College v. Indus. Comm., — Ill. —, (1920), 128 N. E. 553, 7 W. C. L. J. 38.

98. Western Indemnity Co. v. State Indus. Acc. Comm., 172 Cal. 766, 158 Pac. 1033, 15 N. C. C. A. 500; Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218, 13 N. C. C A. 847.

99. Maughlelle v. J. H. Price & Sons, 99 Kan. 412, 161 Pac. 907, 15 N. C. C. A. 498; LeMay v. Indus. Comm., 292 Ill. 76, (1920), 126 N. E. 604, 5 W. C. L. J. 796; Tsangournos v. Smith, 183 N. Y. 751, 171 Supp. 256, 2 W. C. L. J. 686; Kackel v. Serviss, 180 App. Div. 54, 167 N. Y. S. 348, 2 W. C. L. J. 686; Carleton v. Fdry. & Mach. Products Co., — Mich. —, 165 N. W. 816, 1 W. C. L. J. 410; Aetna Life Ins. Co. v. Otis Elevator Co., — Tex. Civ. App. —, 204 S. W. 376, 18 N. C. C. A. 586, 2 W. C. L. J. 592.

pensation to the injured employees of the subcontractor the same as if the subcontractor were a subscriber.[1]

Under the section of the Pennsylvania Act which provides that, "After December 31, 1915, an employer who permits the entry, upon premises occupied by him or under his control, of a laborer or an assistant hired by an employee or contractor, for the performance upon such premises of a part of the employer's regular business intrusted to that employee or contractor, shall be conclusively presumed to have agreed to pay to such laborer or assistant compensation in accordance with the provisions of article three." Therefore a contractor is liable for the injuries to the employees of his subcontractors and their subcontractors; but he is not liable for compensation for the death of an employee of another contractor, on the same premises, in the furtherance of the owner's general plan, on the same structure or enterprise performing under another and different contract with the owner of the premises, for he is an independent contractor under the law and his employees must look to him for compensation.[2]

"If a subscriber makes a contract with an independent contractor to do the subscriber's work and the insurer would be liable to pay compensation if such work was executed by the employee of the subscriber, it is required to pay such compensation to the employee of the independent contractor, if the work is a part of 'or process in' the trade or business carried on by the subscriber, and not merely incidental or ancillary thereto, and if the injury occurs 'on, in or about the premises on which the contractor has undertaken to execute the work for the subscriber or which are under the control or management of the subscriber.' St. 1911, c. 751, pt. 3, par. 17. Under this section the employeee of a contractor can recover against the subscriber, if the employee shows he was at work on premises under the control and management of the subscriber or where the contractor has agreed to perform the

1. White v. Geo. A. Fuller Co., 226 Mass. 1, 114 N. E. 829, 15 N. C. C. A. 499; City of Milwaukee v. Fera, 170 Wis. 348, (1919), 174 N. W. 926, 5 W. C. L. J. 336.

2. Qualp v. James Stewart Co., 109 Atl. 780, 266 Penn. 502, (1920), 6 W. C. L. J. 99.

particular work, and, in addition, that his injury arose out of and in the course of employment which was a part of the subscriber's trade or business and not merely incidental or ancillary to it. There was evidence to warrant the finding that the carrying of building material and appliances from the subscriber's yard to the place where the building was to be erected, was a part of the trade or business carried on by the subscriber as a building contractor. The removal was not merely ancillary or incidental to the work of constructing the building, and this work could not be contracted for so as to relieve the subscriber to contract for the transfer of its material. See Knight v. Cubitt & Co. L. R., (1920), 1 K. B. 31; White v. Fuller, 226 Mass. 1, 114 N. E. 829."[3]

A manufacturing company entered into a contract with one M. to wreck a smokestack for $140. M. arranged with applicant's decedent to supervise the work and employ help, and receive one half the proceeds after deducting expenses. It was further agreed that if one half the proceeds did not amount to $5.00 per day, M. would make up the deficiency. While engaged in this work decedent fell, sustaining injuries which caused his death. The manufacturing, establishment denied liability, because section 31, of the Illinois act applied only where there was a contractor and subcontractor and imposed liability upon the contractor where he failed to require the subcontractor to insure. (The court held that decedent occupied the position of foreman and as such was the employee of M. After observing that some employers are irresponsible, and that the purpose of the compensation act would be defeated if the claims of such employers could only be enforced against the immediate employer, the court said: "The plaintiff in error contracted with Malone to do the work of wrecking the smokestack, which work was extrahazardous, and plaintiff in error therefore comes within the description of the persons upon whom liability was imposed by the section. The fact that the words 'principal' and 'principals' were thereafter used in the section as referring both to the person contracting with another to do or have done for him the extrahazardous work and to the one

3. In re Commerford, 229 Mass. 573, 118 N. E. 900, 1 W. C. L. J. 793.

undertaking to do such work, thereby rendering the section ambiguous, should not be permitted to defeat the evident purpose of the legislature in adopting section 31 as part of the act."[4]

An employer is liable for injuries to an employee in the employment of his subcontractor, even though the contract between the subcontractor and principal contractor is void because made on Sunday, as such fact is immaterial.[5]

§ 463. **Recurrence of Disability and Liability of Subsequent Insurance Carrier.**—"While it may be that part of the disability results from what occurred September 7th, the evidence is nevertheless clearly persuasive, if not conclusive, that nothing would have occurred on September 7th, if it had not been for the accident on May 13th. The commission finds that on September 7th, while attempting to crank an automobile, as the claimant 'took hold of the crank handle, the fracture which he had sustained on May 13, 1918, again parted.' The evidence justifies no other finding. There was no accident on September 7th, except as the condition caused by the accident in May was made worse. Clearly, if the claimant had not broken his arm in May, he would have sustained no injury in September. That is entirely clear from the record, it is just that the first insurer should bear the entire liability, and it is unjust that the claimant should be subjected to the delay and annoyance of an attempted adjustment of liability between the two insurance carriers."[6]

§ 464. **Construing a Policy.**—Where there is any ambiguity about the terms of a policy, it will be construed against the insurer, but where the terms are not ambiguous the contract between the employer and the insurance carrier must be respected.

4. American Steel Foundries v. Indus. Bd., 284, Ill. 99, 119 N. E. 902, 17 N. C. C. A. 701.

5. Wausau Lbr. Co. v. Industrial Commission, 166 Wis. 204, 164 N. W. 826, 15 N. C. C. A. 446.

6. Phillips v. Holmes Express Co., 190 App. Div. 336, (1919), 179 N. Y. S. 490, 5 W. C. L. J. 440.

the industrial commission being without power to make a new contract for them.[7]

Under a policy insuring the employer against loss from injuries to servants engaged in road making to be conducted at a designated place, the employees need not be at work all the time at the designated place, but the work must be incidental to that work. Such policy does not cover a person kalsomining the employer's residence.[8]

A provision of a policy excluding "employees operating farm machinery" was held not to include one holding a light for the engineer on a tractor while harrowing at night.[9]

§ 465. **Loaned Employee.**—An insurance company cannot be held liable for compensation to an employee who has been injured during the time he was loaned to a third person to perform work entirely different to that for which the policy was issued to cover.[10]

"The facts found by the referee justify the award. A master may loan his servant, with the latter's consent, to another under such circumstances as to create for the time a new relation of master and servant; the regular servant of one may thus for the time being become the special servant of another, and that was done here. Where one person lends his servant to another for a particular employment, the servant must be dealt with as a servant of the man to whom he is lent, although he remains the general servant of the person who lent him. The test is whether, in the particular service which he is engaged to perform, he continues subject to the direction and control of his master or becomes subject to that of the party to whom he is lent or hired.[11]

7. Worswick Street Paving Co. v. Indus. Acc. Comm., — Cal. —, (1919), 185 Pac. 953, 5 W. C. L. J. 342.

8. Hungerford v. Bonn, 183 App. Div. 818, 171 N. Y. S. 280, 2 W. C. L. J. 682.

9. Maryland Cas. Co. v. Indus. Acc. Comm., 178 Cal. 491, 173 Pac. 993, 2 W. C. L. J. 616.

10. Bayer v. Bayer, 191 Mich. 423, 158 N. W. 109; Scribner's Case, 231 Mass. 132, 120 N. E. 350, 2 W. C. L. J. 275.

11. Tarr v. Hecla Coal and Coke Co., — Pa. —, (1920), 190 Atl. 224, 5

§ 466. **Subrogation of an Insurance Carrier.**—Where an employee, whose injury was caused by the negligence of a third party, elects to take under the compensation act and assigns his cause of action against the third party to the insurance carrier, the court in holding that the assignee might sue in its own name said: "The remedy provided in section 1902 is, by the language of the section of the New York Act, peculiar to the enforcement by the dependents of their cause of action of which it is not an integral part. The legislature confined the pursuit of that remedy to the dependents, in behalf of simplicity and convenience in procedure. In case the dependents elect to assign the cause of action, the assignment creates its ordinary and established effects. It transfers to and vests in the assignee the cause of action. If the assignment is to the state, the cause of action is thereby made the property of the state; if to another, the cause of action becomes by virtue of the assignment the property of that other. In the case at bar the dependents assigned the cause of action to the plaintiff. A cause of action inherently includes and comprehends, in the absence of restrictive language, the right to maintain an action upon the claim or matter, which also is inherently included in it."[12]

It is now provided that "the awarding of compensation shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom and otherwise to the per-

W. C. L. J. 904; Puhlman v. Excelsior E. & S. C. Co., 259 Pa. 392, 103 Atl. 218, L. R. A. 1918E, 118; 26 Cyc. 1285; And see Crouse et al. v. Lubin, 260 Pa. 329, 103 Atl. 725; Gallagher v. Walton Mfg. Co., 264 Pa. 29, 107 Atl. 327; Belmonte v. Connor, 263 Pa. 470, 106 Atl. 787; Messer v. Manufacturers' L. & H. Co., 263 Pa. 5, 106 Atl. 85; Burns v. Jackson, — Cal. App. —, 200 Pac. 80.

12. Travelers' Ins. Co. v. Louis Padula, 121 N. E. 348, 18 N. C. C. A. 580, 3 W. C. L. J. 339; Revg. 184 App. Div. 791, 170 N. Y. Supp. 869. Motion for reargument denied, 121 N. E. 894. Note this case was based upon the compensation act, Sec. 29, prior to the amendment of this section by Laws of 1917, C. 705, Section 8.

son, association, or insurance carrier liable for the payment of such compensation."[13]

Under the Texas Act as amended in 1917, C. 103, part 4, Sec. 2, an insurance carrier is subrogated to the rights of an employee who was injured through the negligence of a third party, upon the election of the employee to take compensation under the act and can enforce its right of action against the third party, either in its own name or the name of the injured employee or his legal beneficiaries for the joint use and benefit of such employee or his beneficaries, and the insurance association. Prior to this amendment no such right existed.[14]

In denying that an insurance carrier had been subrogated to the rights of an injured employee, to whom it had paid compensation for an injury caused by the negligence of a third party, and also in denying the carriers claim to a right to intervene in a suit brought by the dependents against the third party, the court said: "When the casualty company insured the Burton Lumber Company in principle it occupied the same position as regular insurance companies. Under the compensation act it is denominated an insurance company, and we see no reason why the laws and decisions of this state relative to other kinds of insurance do not apply to it. We are of opinion that appellant in issuing this policy of insurance took the risk of not having anything to pay, and, having lost it, must stand the consequences."[15] Under the amendment of 1917, however, this ruling would have been different.

It is now expressly or impliedly provided in many acts that the employer or his insurance carrier upon payment of compensation to an employee injured through the negligence of a third

13. Laws of New York, 1917, C. 705, Section 8.

14. City of Austin v. Johnson, — Tex. Civ. App. —, 204 S. W. 1181, 18 N. C. C. A. 583; Southern Surety Co. v. Houston Lighting and Power Co., — Tex. Civ. App. —, 203 S. W. 1115, 18 N. C. C. A. 583, — Tex. Civ. App. —, 204 S. W. 376, 18 N. C. C. A. 580; Miller v. N. Y. C. Rys. Co., 171 N. Y. App. 316, 157 N. Y. S. 200, 14 N. C. C. A. 915.

15. Texas & P. Ry. Co. v. Archer, — Tex. Civ. App. —, 203 S. W. 796, 18 N. C. C. A. 587.

party is subrogated to the rights of the injured employee and may recover against the third party.[16]

The Indiana Act confers the right of subrogation on the insurance carrier; but only in the event of its paying the whole amount due, if its policy may be so construed. The court said: "It is a general rule, applicable to actions based on the ground of subrogation, that such right does not exist, unless the whole debt involved has been paid. 37 Cyc. 379; Miami County Bank v. State ex rel., (1915), 61 Ind. App. 360, 112 N. E. 389; Hunter v. First National Bank, (1908), 172 Ind. 62, 87 N. E. 734; Bank, etc. v. Wortendyke, 27 N. J. Eq. 658; Bartholemew v. National Bank, 57 Kan. 594, 47 Pac. 519; Knaffl v. Knoxville, etc., Co., 133 Tenn. 655, 182 S. W. 232, Ann. Cas. 1917C, 1181; Columbia etc., Co. v. Kentucky, etc., Co., 60 Fed. 794, 9 C. C. A. 264; American, etc., Co. v. National etc., Co., 99 Am. St. Rep. note p. 482. This rule applies to conventional as well as legal subrogation. unless the contract by which such right is created provides otherwise. Sheldon on Subrogation (2 Ed.) Par. 248; Loeb v. Fleming, 15 Ill. App. 503; Springer v. Foster, (1901), 27 Ind. App. 15, 60 N. E. 720; Stuckman v. Roose, (1896), 147 Ind. 402, 46 N. E. 680. In the instant case, appellant is seeking to be subrogated to the right of action conferred on the said Dunn-McCarthy Company against appellant, by section 13 of the Workmen's Compensation Act. (Act. 1915, p. 395). It bases this right on clause H of the policy in suit, which reads as follows: 'In case of the payment of loss or expense under this policy, the company shall be subrogated to all the rights of this employer or any employee or dependent covered hereby to the extent of such payment, and this employer shall execute all papers required and shall cooperate with the company to secure such rights.' This provision must be considered in connection with the other portions of said policy and when this is done it it apparent that it should be construed as an attempt to confer the right of subrogation on appellant only

16. Golden & Boter Transfer Co. v. Brown & Sehler Co., — Mich. —, (1919), 173 N. W. 405; Labuff v. Worcester Consolidated St. Ry. Co., 231 Mass. 170, 120 N. E. 381, 2 W. C. L. J. 903; Miller v. N. Y. Rys. Co., 171 N. Y. App.Div. 316, 157 N. Y. S. 200, 14 N. C. C. A. 915.

in the event it has paid the whole liability due in any given case, and not an attempt to provide for subrogation pro tanto." [17]

Under the Illinois Act of 1913 a carrier by land is conclusively presumed to come under the act, unless an election to the contrary is made. Therefore no affirmative election is necessary to entitle it to subrogation.[18]

Under the Texas Act, which authorizes an insurer who has paid compensation to sue the negligent third party, and after reimbursing himself to pay the remainder to the injured employee, an employee after receiving compensation may sue the third party, upon the employer's failure to sue, and recover full damages less the compensation previously received.[19]

The Iowa Act limits the right of an employer or insurance carrier paying compensation to the amount he has been compelled to pay and he is subrogated to that extent only, and is not entitled to recover the full damages from the negligent third party. The servant injured through another's negligence, after receiving compensation, may bring an action to recover damages, subject to the employer's right to be indemnified; and the employer is entitled to be brought into the suit in order that he may be indemnified in case damages are recovered.[20]

Where an employer has knowledge of the accident and accepts the responsibility of paying compensation, he has a right of action against the negligent third party causing the injury, and the amount recoverable is not limited to the amount paid by

17. Maryland Cas. Co. v. Cinn. C., & St. L. Ry. Co., — Ind. App. —, (1919), 124 N. E. 774, 5 W. C. L. J. 69.

18. Cousley v. Chicago and A. R. Co, 207 Ill. App. 565, 17 N. C C. A. 465.

19. Wm. Cameron & Co., v. Gamble, — Tex. Civ. App. —, (1919), 216 S. W. 495, 5 W. C. L. J. 312.

20. Fidelity Cas. Co. v. Cedar Valley Electric Co., — Iowa —, (1919), 174 N. W. 709, 5 W. C. L. J. 228; Mayhugh v. Somerset Telephone Co., 265 Pa. 496, (1920), 109 Atl. 213, 5 W. C. L. J. 891; Albrecht Co. v. Whitehead & Kales Iron Works, 200 Mich. 109, 166 N. W. 855, 1 W. C. L. J. 1013.

him; but anything in excess of what he was compelled to pay must be turned over to the employee or his dependents.[21]

The insurance carrier and the injured party may jointly sue the negligent third party who caused the injury, without a formal award of compensation as a prerequisite.[22]

Where a dependent father chose to accept compensation for the death of his son due to the negligence of a third party, he thereby caused an assignment of any cause of action he had to the employer or insurance carrier, who could prosecute an action for the recovery of damages in its own name. However, the dependent father still had an interest in any recovery that might be had in excess of the amount paid by the insurance company or the employer in settlement of the compensation claim, and was a proper party plaintiff in the action against the third party, but he must join the employer or insurance carrier, whichever one paid the claim.[23]

The employer's or insurance carrier's right of subrogation is similiar to a lien, and a settlement by the injured employee releasing the third party can in no way affect the lien, since the wrongdoer is chargeable with notice that settlement could not affect the employer's right, nor can the commission disturb this right without the consent of the employer.[24]

The right of subrogation existing in favor of an insurance carrier is for its own benefit, to the extent to which it has been held liable, so that its application for intervention must be allowed

21. Western Gas and Electric Co. v. Bayside Lbr. Co., — Cal. —, (1920), 187 Pac. 735, 5 W. C. L. J. 649.

22. Moreno v. Los Angeles Transfer Co., — Cal. App. —, (1920), 186 Pac. 800, 5 W. C. L. J. 489.

23. Stackpole v. Pacific Gas and Electric Co., — Cal. —, (1919), 186 Pac. 354; Hall v. Henry Thayer & Co., 225 Mass. 151, 113 N. E. 644, 14 N. C. C. A. 1014.

24. Papineau v. Indus. Acc. Comm., — Cal. App. —, (1919), 187 Pac. 108, 5 W. C. L. J. 492; Sabatino v. Thomas Crimmins Const. Co., 102 N. Y. 172, 168 N. Y. Supp. 495, 1 W. C. L. J. 709; Hugh Murphy Const. Co. v. Serck, — Neb. —, (1920) 117 N. W. 747, 6 W. C. L. J. 194.

in a suit by the injured employee against the negligent third party.[25]

Where it was contended "that the plaintiff had no right to bring the action in his own name under section 3659, Rev. St. 1913. In Muncaster v. Graham Ice Cream Co. (No. 20421), 103 Neb.——, 172 N. W. 52, it was decided that the statute did not take away the right of the employer to recover damages against a third person when the relation of master and servant does not exist; that the section was designed for the protection of an employer who had paid the compensation; that, if the employer's rights were protected, it was no concern of the negligent third party. Furthermore, there was an agreement between the plaintiff and his employer with respect to the bringing of this action, which was approved by the district court. Defendent under these circumstances suffered no prejudice and cannot complain."[26]

Where a city was subrogated to the rights of deceased's widow, and brought action against the electric company for the negligent killing of deceased, the company could not set up the city's contributory negligence in not condemming the location of the wires, since the city was acting on behalf of the dependents and not suing in its own right.[27]

The amount of insurance paid by an insurance carrier to an injured employee, cannot be recovered from a negligent third party, where the employee has obtained full damages in a suit against such party.[28] Under some acts it is held to the contrary.

Where an employee is injured through the negligence of a third party, either the employee or the employer may sue for the entire damages. The employer may continue any action begun by an employee after the liability has been fixed, and anything recovered in excess of the compensation fixed is to be turned over

25. Lancaster v. Hunter, — Tex. Civ. App. —, (1919). 217 S. W. 765, 5 W. C. L. J. 612.

26. Thomas v. Otis Elevator Co., 103 Neb. 401, (1919), 172 N. W. 53, 4 W. C. L. J. 114.

27. City of Shreveport v. S. W. Gas & Electric Co., 145 La. 680, (1919), 82 So. 785, 4 W. C. L. J. 605.

28. Southern Surety Co. v. Chicago, St. P., M. & O. Ry. Co., — Iowa —, (1919), 174 N. W. 329, 4 W. C. L. J. 710.

to the injured employee. In case of a controversy over the proceeds of the suit, the court may determine its proper distribution.[29]

In construing sections 31 and 34 of the California Act of 1913, the court said: "A proper construction of these provisions of the Workmen's Compensation Act in our judgment is that they were intended to permit what has not heretofore been sanctioned by law, viz., an assignment of an injured person's right of action against his tort-feasor, and to provide that the making by him of a lawful claim for compensation under the terms of the Workmen's Compensation Act against his employer, and the latter's insurer, should operate as a transfer of the legal title to his claim for damages against his said tort-feasors to his employer, or to the latter's insurer, paying such claim. This has in effect been so held by this court in the recent case of Bassot v. United Railroads, 177 Pac. 884. The respondents insists, however, that the use of the word 'subrogated' in the foregoing provisions of the Workmen's Compensation Act rendered the right action acquired by the plaintiff thereunder an equitable cause of action as against the defendant herein. We do not agree with this contention; for, while it is true that as between the insurer and employee the right of subrogation would be an equitable right arising out of the payment by the former of the latter's claim for damages, still, when such payment had been made, and the assignment of employee's cause of action against the defendant herein consummated by such subrogation, the right thus accrued in the plaintiff was that of maintaining, as the assignee of the employee the same action which the employee could have maintained against this defendant had no such assignment been made."[30]

Where employer, employee, and the third person negligently causing the injury are all operating under the act, there is no right of action existing in favor of the injured employee against the negligent third party. The employee must look to his employer for compensation and the employer is subrogated to the

29. Gonas v. Fisher, 286 Ill. 606, (1919), 122 N. E. 95, 3 W. C. L. J. 596. See § 45 page 196.

30. Mass. Bond. & Ins. Co. v. San Francisco, — Oakland Terminal Rys., 39 Cal. App. 388, (1919), 178 Pac. 974, 3 W. C. L J. 574.

rights of the employee against the third party. This provision of the Illinois act is constitutional, since the parties are bound only in the event of their election to abide by it.[31]

And where the third party is not subject to the act the injured employee may recover damages in full from him subject to the employers right to deduct the amount recoverable from the compensation he is compelled to pay.[32]

The Supreme Court of Wisconsin in holding that an employer acquired no right of action against the negligent third party which can pass by subrogation to an insurer, and in construing the Ilinois Act on this question, said: "The contention of the appellant on this appeal involves the rights of the parties to the action under section 29 of the Workman's Compensation Act of Illinois, set out in the foregoing statement. The provisions of this section show a clear legislative intent to fix the rights of employees and employers to the damages recoverable for personal injuries to employees against persons other than the employer who are legally liable to the injured employee or his personal representative. When the employer, the employee, and the third person legally liable to the injured employee are all subject to this Compensation Act, then the right to damages by the empoyee or his personal representative against such other person 'shall be subrogated to his employer,' and the employer may prosecute an action against such other person 'to recover such damages sustained,' the amount thereof being limited to aggregate the amount of compensation payable. When, however, the third person who is legally liable to the injured employee or his personal representative is not subject to the Compensation Act, then an action may be prosecuted against such other person legally liable in damages to the injured employee or his personal representative, but if such employee or his personal representative have accepted or agreed to accept compensation, then the 'employer shall

Friebel v. Chicago City Ry. Co., — Ill. —, 117 N. E. 467, 1 W. C. L. J. 18.

32. Northern Pac. R. Co. v. Meese, 239 U. S. 614, 16 N. C. C. A. 939; 60 L. Ed. 467, 36 Sup. Ct. Rep. 223; Mathison v. Minn. St. Ry. Co., 126 Minn. 286, 148 N. W. 71, 5 N. C. C. A. 871. But see Peet v. Mills. 76 Wash. 437, 133 Pac. 685, 4 N. C. C. A. 786.

be subrogated to all the rights of such employee or personal representative,' and sue in his name or in the name of the employee or his personal representative to recover such damages, but of the damages so collected by the employer, any sum in excess of the compensation, costs, attorney's fees, and expenses incurred by him he is required to pay to the injured employee or his personal representative. We have not been favored with any decision of the courts of Illinois dealing with this statute and the question involved here. It is manifest from the provisions of the act that the Legislature intended that the legal rights of the employee or his personal representative arising from acts of negligence of other persons than the employer proximately causing the employee damages should not be affected by the provisions of the Compensation Act, except that the employer is subrogated to the right to recover such damages for the purpose of applying such damages in payment of the compensation paid by the employer and to receive and account for all sums received in excess thereof to the employee or his personal representative. This object of the legislature conflicts with a claim that an insurer of the employer becomes subrogated to any right to any such damages upon payment under the contract of insurance to the employer the amount of its liability. It is manifest that the rights the employer acquires to the injured employee's right to such damages contemplated by the act is the right to enforce the employee's claim against such other person for the benefit of himself and the employee and that they are to be applied in payment of the compensation provided for in the act, and any excess is the property of the employee or his personal representative. Under these conditions and relations of the parties the employer has and acquires no rights of action against the third party liable to the employee, but is simply subrogated to the right of enforcing the employee's claim and to distribute the amount recovered between the employer and employee as prescribed by the Compensation Act. This right does not vest in the employer any such right of action which can pass by subrogation to an insurer of the employer for saving him harmless from loss under the compensation law. The Circuit Court of Appeals for the United States for the Eighth Circuit, in

considering the rights of persons covered by the provisions of the Nebraska Compensation Act under circumstances similar to those involved here, expresses the view that the cause of action of the employer against such third person under such a subrogation must be treated as if it were prosecuted by the injured employee or his personal representative. Otis Elev. Co. v. Miller & Paine, 240 Fed. 376, 153 C. C. A. 302. Another aspect of the case is presented by the fact that the insurance carried by the plaintiffs in the Ben Franklin Mutual Casualty Company to protect itself against loss arising out of or resulting from injuries to its employees in the course of their employment is in its nature accident insurance. Under insurance contracts of this class, the insurer is not subrogated to the rights of the insured against third persons whose negligence caused the injury for which the insurer has been held liable under such policy. In Gatzweiler v. Mil. E. R. & L. Co., 136 Wis. 34, 116 N. W. 633, 18 L. R. A. (N. S.) 211, 128 Am. St. Rep. 1057, 16 Ann. Cas. 633, this court, speaking on this subject, declared: 'We * * * hold that such a policy is an investment contract giving to the owner or beneficiary an absolute right, independent of the right against any third party responsible for the injury covered by the policy, * * * that in the absence of a feature expressly making the policy of insurance an indemnity contract, it should not be regarded as such, but held to be an investment contract in which the only parties concerned are the insurer and the insured or the beneficiary.' In Shuttles v. Railway Mail Assoc. 156 App. Div. 435, 141 N. Y. Supp. 1024, it is held that such insurance contracts are not contracts of indemnity only, and that the right of subrogation as contended for by the defendants here does not apply. McAdow v. K. C. W. Railway Co., 196 Kan. 423, 151 Pac. 113, L. R. A. 1917B, 1158. See, also, note to Gatzweiler Case, 18 L. R. A. (N. S.) 211.''[33]

Where an employer is subrogated to the rights of an employee injured through the negligence of a third party, the employer's negligence cannot be pleaded as a defense, nor is the fact that the employer was insured material, for it should be considered

33. Marshall-Jackson Co. v. Jeffery, 167 Wis. 63, 166 N. W. 647, 1 W. C. L. J. 892.

as though brought by the employee, if injured, or by his personal representative if he were killed. The amount recoverable is not limited to the compensation paid, but the entire damages in full may be collected, the excess to be paid over to the dependents.[34]

An employer who has been subrogated to the rights of his injured employee may assign his right of action to the insurance carrier.[35]

Under the Massachusetts Act when an employee elects to take compensation, and the same is paid by the insurance association, it may enforce in the employee's name or in its own name and for its own benefit, the liability of such third person. However, the statutory provision did not impart into its terms the equitable principle of subrogation, but simply provided for the enforcement by the insurance carrier for the benefit of the dependents, after deducting the amount it had paid in compensation. Therefore, the amount recoverable is not limited, but full damages may be collected.[36]

Where an employee has elected to take compensation under the New York Act, the employer is subrogated to the rights of the employee as against the negligent wrongdoer. The recovery in excess of the amount paid for compensation is to be held in trust for the dependents, and the insurance carrier is not permitted to retain it to its own benefit.[37]

Where an employee accepts compensaton under the New York Act for an injury sustained through the negligence of a third

34. Otis Elevator Co. v. Miller & Paine, 153 C. C. A. 302, 240 Fed. 376, 14 N. C. C. A. 1013.

35. Frankfort Gen. Ins. Co. v. City of Milwaukee, 164 Wis. 77, 159 N. W. 581, 14 N. C. C. A. 1013; McGarvey v. Indep. Oil & Grease Co., 156 Wis. 580, 146 N. W. 895, 5 N. C. C. A 803.

36. Turnquist v. Hannon, 219 Mass. 560, 107 N. E. 443, 14 N. C. C. A. 1015; Barry v. Bay State St. Ry. Co., 220 Mass. 366, 110 N. E. 1031.

37. U. S. Fidelity & Guar. Co. v. N. Y. Rys. Co., 93 N. Y. Misc. 118, 156 N. Y. S. 615, 14 N. C. C. A. 1018; Casualty Co. of America v. A. L. Swett Elec. Light & Power Co., 174 N. Y. App. Div. 825. 162 N. Y. S. 107. 14 N. C. C. A. 1018; Bethlem Steel Co. v. Variety Iron and Steel Co., —Md.—, (1921), 115 Atl. 59.

party he is estopped to deny that the insurance carrier has been subrogated to all of his rights against the wrongdoer.[38]

Where an employee received compensation from the city and the city reassigned its claim to the injured employee to prosecute against the negligent third party and after reimbursing the city for the compensation it was compelled to pay the employee was to retain the remainder; the court held that the third party's objection to the right of plaintiff to sue was untenable, for after the city was subrogated to the employee's right of action, it could assign it to whomsoever it saw fit.[39]

An employer's liability insurer is subrogated to the right of action of the injured employee against a negligent third party to recover a sum corresponding to the amount of the assured's right of action, and it is immaterial that the liability of the third party was statutory and existed in favor of certain persons only; nor is the obtaining of a judgment by the insurer against the assured a prerequisite to the recovery.[40]

"The English Workmen's Compensation Act of 1906 (Section 6) provides that 'where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—the workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under the Act for such compensation, but shall not be entitled to recover both damages and compensation. If the workman has recovered compensation under this Act, the person by whom the compensation was paid, and any person who has been called upon to pay an indemnity under the section of this Act relating to subcontracting, shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to right to and amount of any

38. Royal Indemnity Co. v. Platt & Washburn Refining Co., 98 N. Y. Misc. 631, 163 N. Y. S. 197, 14 N. C. C. A. 1020.

39. Saudek v. Milwaukee Electric Ry. & Light Co., 163 Wis. 109, 157 N. W. 579, 14 N. C. C. A. 1020.

40. Travelers' Ins. Co. v. Great Lakes Engineering Co., 184 Fed. 426, 1 N. C. C. A. 747.

such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this Act.' " [41]

An employer or insurer who has paid compensation under the Michigan Act, to an employee injured through the negligence of a third party, is subrogated to the employee's rights against the third party to reimburse them to the amount so expended.[43]

"Where an employee was injured prior to the New Jersey Act of 1913 (P. L. 1913, p. 320), through the negligence of one not his employer, under such circumstances as to entitle him to compensation from his employer under the Act of 1911(P. L. 1911, p. 520), the employer could not recover of the tort-feasor for the compensation paid to the employee under the statute; the statutory compensation is a part of the compensation of the employee by services rendered for which the employer receives a quid pro quo. The loss to the employer is the value of the services of the employee to him, not the necessary expense of securing them."[44]

Prior to the amendment of the New Jersey Act in 1913, an employee injured by a third person could recover against such third person as well as against the employer, and the employer or insurance carrer was not subrogated to the rights of the employee to reimburse themselves for the amount they were compelled to pay under the Compensation Act. [45] But under the act as amended the employer is entitled to be subrogated to the extent that the amount collected from the third person shall be credited on the compensation due from the employer.[46]

41. Dickson v. J. A. Scott, Lin., (1914), W. C. & Ins. R. 69, 5 N. C. C. A. 524; Smith's Dock Co., Ltd., (1912), 2 K. B. 323, 81 L. J. K. B. 808, 106 L. T. 843, 28 T. L. R. 397, 5 B. W. C. C. 450, 5 N. C. C. A. 525; Lees v. Sykes, 4 B. W. C. C. 115, 2 N. C. C. A. 509. Note — See 5 N. C. C. A. 524, for British cases on this subject.

43. Grand Rapids Lbr. Co. v. Blair, (Mich.), 157 N. W. 29.

44. Interstate Telephone and Telegraph Co. v. Public Service Electric Co., (N. J. L.), 90 Atl. 1062. 5 N. C. C. A. 524.

45. Newark Paving Co. v. Klotz, 85 N. J. L. 432, 91 Atl. 91, 7 N. C. C. A. 811.

46. Interstate Telephone and Telegraph Co. v. Pub. Serv. Electric Co., — N. J. —, 90 Atl. 1062; Newark Paving Co. v. Klotz, 85 N. J. 432, 91 Atl. 91.

An employer cannot release a negligent third party so as to affect the insurance carrier's right of subrogation.[47]

It has been held under the California Act that where a deceased leaves a widow and two sons and an Insurance Company paid compensation to the widow, which was the only claim made upon it, the insurer nevertheless was subrogated to the right to recover damages to the sons as well as to the widow; for the making of a lawful claim for compensation under the Industrial Compensation Act works a subrogation of any right of action to recover for the death, whether the person making the claim be the exclusive beneficiary for whom such action would lie or not.[48]

Negligence on the part of an employee will defeat a recovery against a third party by the subrogated insurer.[49]

The provision of the California Act for subrogation to the rights of an injured employee, will not be enforced in Oregon, because in Oregon a tort action is not assignable. Therefore a claim against the deceased's employer, a California corporation, deceased being a resident of that state, will not preclude the widow's recovery against the negligent third party in Oregon on the theory that the employer was subrogated to her rights, and the widow may sue the third party and recover full compensation.[50]

§ 467. **Subrogation of an Injured Employee to Employer's Rights Against Insurer in Case of the Employer's Insolvency.**—An insurance company attempted to insure an employer against injuries under the Compensation Act and limit its liabilities by attaching a rider to the policy which read as follows:

"The assured under this contract having elected to operate under the so-called Workmen's Compensation Act (of 1913

47. Woodward v. E. W. Conklin & Son, 171 N. Y. App. Div. 736, 157 N. Y. Supp. 948.

48. Mass. Bonding & Ins. Co. v. Los Angeles R. Corp.,—Cal.—,(1920), 190 Pac. 161, 6 W. C. L. J. 253; Western States, etc., Co. v. Bayside Lbr. Co., — Cal. —, 187 Pac. 735, 5 W. C. L. J. 649.

49. Globe Indem. Co. v. Hook, — Cal. App. —, 189 Pac. 797, 6 W. C L. J. 127.

50. Rorvik v. Northern Pac. Lbr. Co.,—Oregon—, (1920), 190 Pac. 331, 6 W. C. L. J. 385.

* * * in consideration for the premium for which this contract is issued, this contract is hereby intended to cover such legal liability of the assured as is imposed by the aforesaid law, including any amendments thereto made after this date. This indorsement is subject to all conditions agreements, and limitation of the contract as stated herein."

Section 28 of the Illinois Workmen's Compensation Act provides:

"Any person, who shall become entitled to compensation under the provisions of this act, shall, in the event of his inability to recover such compensation from the employer on account of his insolvency, be subrogated to all the rights of such employer against any insurance company, association or insurer which may have insured such employer against loss growing out of the compensation required by the provisions of this act to be paid by such employer, and, in such event only, the said insurance company, association or insurer shall become primarily liable to pay to the employee or his personal representative the compensation required by the provisions of this act to be paid by such employer."

The Court, in construing this section and the liability of the insurer thereunder, said:

"While the question is not entirely free from doubt, it would appear to be a fair construction of section 28 that the Legislature intended, under certain conditions, to charge the liability directly to the insurer, and it is not an unreasonable construction to hold it also intended to include the method of collection in compensation cases within the meaning of the words 'primarily liable to pay * * * by the provisions of this act.' It must be assumed that the plaintiff in error was familiar with these provisions of the law and provided for just such a primary liability as this when it executed the rider attached to the insurance contract. If, as seems to be argued by counsel for plaintiff in error, the provisions of section 28 were only intended to give to the applicant the common-law or equitable right of subrogation, by which such employee would have no greater right than the employer and could not compel payment by the insurance company until the employer himself had made payments to the employee, then the right of

the employee to compensation or to recover from the insurance company would be practically lost. Such a construction would seem to make the provisions of section 28 as to the insurance company being primarily liable, meaningless. The court should construe this act reasonably, so that each part of it will be given effect, and the only way that it can be given effect is to construe it to mean that in case of the employer's insolvency the insurance company can be substituted and required to make the payments to the employee provided for by the act and to pay him as required by the act, that is, in installments from week to week, when the employee is entitled to payments in that manner under the act. The insurance company in the rider attached to the policy assumed this responsibility, and became liable in the same manner as the employer was liable under the act, and the act, therefore, in our judgment, became a part of the insurance company's contract liability, and all provisions of the original policy which conflicted with said agreement in the rider or with said Compensation Act were practically set aside by said rider. By the provisions of sections 26 and 28 of the Workmen's Compensation Act the Legislature intended that in case of the employer's insolvency the insurance company should step into the shoes of the employer and make the payments as the employer would have made them under the act, and in case of such insolvency the insurance company should become 'primarily liable' in the same manner that the employer would have been liable if solvent. It was not the intention of the act that in case of the employer's insolvency the insurance company's liability should be lessened or modified. Section 15 of the act provides that the Industrial Commission shall have jurisdiction over the operation and administration of the act. Section 31 of the act provides for recovery against the contractor, who is not the employer, who fails to require his subcontractor, who is the employer, to insure his liability to pay the compensation provided in this act. This court has held that under this section the Industrial Commission had jurisdiction to make an award against the contractor when the subcontractor employer failed to furnish the insurance. Parker Washington Co. v. Industrial Board, 274 Ill. 498, 113 N. E. 976

The Legislature intended by this act to make provision for a speedy disposition and settlement of the claim of the injured employee. To accomplish that purpose the act should receive a liberal construction. The reasoning of this court in construing the provisions of section 29 of the act as to subrogation, in Gones v. Fisher, 286 Ill. 606, 112 N. E. 95, and cases there cited, strongly supports the giving of such liberal construction to the act in order to accomplish the legislative intention.

"It is also argued in this connection that the insurance contract between plaintiff in error and Edlund provides, among other things that 'no action for the indemnity provided by this contract shall be against the exchange, except for reimbursement of the amount of loss actually sustained and paid in money by the assured in full satisfaction,' etc. Here, again, we think plaintiff in error is precluded by the agreement entered into by the rider attached to the insurance contract from raising this objection. By its agreement when it assumed the obligations provided for in the Workmen's Compensation Act it waived, in effect, this provision of its original contract. To permit the provision of the insurance contract to prevail over the provision of the statute would be to defeat the plain purpose of the act in a case of this kind. Plaintiff in error could not accept the premium charged for insurance against industrial accidents and yet make its own contract as to its liability and method of payment. The Industrial Commission had jurisdiction under the rider contract, to enforce the payment of this claim against the insurance company if it was a proper claim, regardless of the provisions of the original insurance policy.

"Plaintiff in error having by the rider attached to the indemnity policy contracted to cover an accident under the Workmen's Compensation Act, and as that act made plaintiff in error liable if the insured became bankrupt, in the light of what has been heretofore said we think the Industrial Commission had jurisdiction as to the claim against plaintiff in error, and that the circuit court rightly held that there was a present obligation on the part of the plaintiff in error to pay the claim of the applicant,

enforceable under the procedure of the Workmen's Compensation Act."[51]

An agreement entered into between the administratrix of a deceased employee with the latter's former employer, whereby she agreed not to sue the employer in case of the insurers' insolvency, is void as against public policy, since the compensation act provides that all agreements to waive rights to compensation under the act shall be void.[52]

The Texas Act expressly authorizes suit against the insurer by the injured employee.[53]

§ 468. **Cancellation of Policy.**—The commission has the power to determine whether a policy of insurance has been cancelled, but in doing so must arrive at its conclusion according to recognized legal principles. So where a policy contained a provision that upon transfer of interests the policy to become, ipso facto, void, the commission would have to recognize this reasonable provision and upon finding that there had been a change of interests to declare the policy as non-existent.[54]

The provision of an insurance policy for cancellation by sending to an employer at his last known residence, a notice by registered mail 10 days prior to the time such cancellation takes effect, and at the same time giving notice of cancellation to the compensation commission, as well as the New York statutory provisions for cancellation are met, where a registered letter has been sent and has arrived at its proper destination 10 days prior to the date of cancellation, although the name of the employer and the name of the town are misspelled, and although the employer does not actually receive the notice, where he has ignored notices that a

51. Illinois Indemnity Exchange v. Industrial Comm., 289 Ill. 233. (1919), 124 N. E. 665, 5 W. C. L. J. 42.

52. Dettloff v. Hammond, Standish & Co., 195 Mich. 117, 161 N. W. 950, 14 N. C. C. A. 901.

53. Fidelity & Gas Co. v. House, — Tex. Civ. App. —, 191 S. W. 155, B 1 W. C. L. J. 1572.

54. Kolb v. Brummer, 185 App. Div. 835, 173 N. Y. S. 72, 18 N. C. C. A. 573; Skoczlois v. Vinocour, 221 N. Y. 276, 116 N. E. 1004, 15 N. C. C. A. 765.

registered letter is ready for delivery, and it is returned to the company nearly three weeks later; and where the commission was likewise notified of the cancellation at the same time.[55]

Where an award was made in favor of an employee and against two insurance carriers, it was contended on appeal that the policy of one of the carriers had been cancelled and that the award against it was erroneous. The commission found that the policy had not been cancelled according to the provisions in the statutes concerning cancellation. The court held that the commission was not required to go beyond its own records to determine whether the policy was in existence or not, and that the award having been primarily made against the employer, neither the commission nor the appellate division had jurisdiction to determine the controversy between the insurance carriers. The award was affirmed.[56]

The fact that an employer has failed to give notice of an injury to an insurance carrier cannot affect its liability to the injured employee.[57] But a breach in an insurance policy will release the insurer as between the employer and itself.[58]

An insurance policy which contains valid provisions for cancellation may, upon compliance with those provisions, be terminated, and since the employee is not a party to the contract of insurance, his consent is unnecessary.[59]

§ 469. **Providing Insurance as Relieving Employer.**—Where an employer complied with the statutory provisions pertaining to insurance he contended that he was thereby relieved from all liability even though the insurance company was insolvent. In overruling this contention the court said: "Section 3127 (of the Utah Act) provides that employers who comply with the pro-

55. Skoczlois v. Vinocour, 221 N. Y. 276, 116 N. E. 1004, 15 N. C. C. A. 765.

56. Hargrave v. Geo. F. Shevlin Mfg. Co., 170 App. Div. 477, 165 N. Y. S. 960, 15 N. C. C. A. 774.

57. Zwiesle v. Ratto, 3 Cal. I. A. C. 372.

58. Shanton v. Masterson, 2 Cal. I. A. Comm., 343

59. Altinovitch's Case, — Mass. —, (1921), 129 N. E. 372.

visions of section 3114 shall not be liable to respond in damages for injuries sustained by their employees not resulting in death. If by complying with section 3114 and obtaining insurance relieves the employer from all liability, as contended by plaintiff, why say 'he is not liable to respond in damages,' leaving the unavoidable inference that he is still liable for compensation?

"Reading the statute as a whole, and considering all of its provisions, the plain and unmistakable import of the language of the act compels the conclusion that the right to compensation arises out of the relation existing between employer and employee; that compensation is a tax upon industry or upon the employer's business, a tax that is added to the price of the product and is ultimately paid by the consumer; that the employer is primarily liable for compensation to the employee; that both employer and insurance carrier are liable for the payment of compensation to the injured employee; and that the default of either will not excuse payment by the other."[60]

Where an award was made against an employer and his insurance carrier, the employer petitioned to be released on the ground that he was insured in a company authorized to transact business within the State of California. The California act provides that where it shall appear that an insurance Company has assumed liability to pay compensation the employer shall thereupon be relieved from liability, and the insurance carrier substituted in any further proceedings, where the employer had served notice on the person claiming compensation and on the insurance carrier, and has filed a copy of such notice with the commission. The insurance carrier's right to do business within the state had been revoked after the happening of the accident, and it was claimed that for this reason notice could not legally be served upon it. In overruling this contention, and anulling the award against the petitioner the court said: "We are satisfied that this fact cannot be held to affect the rights of petitioner. The law clearly requires that the employer shall be relieved from all liability for compensation if at the time of the suffering of' the injury for

60. American Fuel Co. of Utah v. Indus. Com., — Utah —, (1920), 187 Pac. 633, 5 W. C. L. J. 616.

which compensation is claimed he is insured against liability for the full amount of compensation payable, by an insurance carrier then authorized to insure him under the laws of the state. It is the situation at the time of the suffering of the injury that controls as to relief from liability. Assuming for the purposes of this decision that the notice must be served and filed by the employer in all respect as provided in section 34 of that the act before exemption from liability can be claimed it is clear that the fact that the insurance carrier is subsequent to the suffering of the injury deprived of its right to further transact such insurance business in the state, cannot be held to deprive the employer of the right to make any service of notice upon it that is essential to full compliance with the terms of the section." [61]

When the employer fails to comply with the insurance provisions of the Iowa Act he is deprived of the benefits of the act and the employee may have his remedy at common law.[62]

An award is properly entered against all insurers and employers where the question of the respective liabilities is not presented.[63]

§ 470. **Estoppel of Insurance Company to Deny Liability.**—A subcontractor, who was also engaged in independent work, requested that the insurance company, which was carrying his employer's risk, carry his risk also on the same policy that covered his employer's risk, and the insurer indorsed upon the policy a provision that the policy should apply "in all its terms and conditions to include. B. as insured thereunder." As a result of this endorsement the subcontractor paid premium on the basis of protection to all his employees, those engaged in the independent work as well as those engaged on the subcontract jobs, honestly believing that they were all included thereunder, and did nothing

61. Weiser v. Indus. Acc. Comm., 172 Cal. 538, 157 Pac. 593, 15 N. C. C. A. 767.

62. Elks. v. Comm., — Ia. —, 172 N. W. 173, 4 W. C. L. J. 72.

63. Hargraves v. Geo. F. Shevlin Mfg. Co., — App. Div. —, 165 N. Y. Supp. 960, B 1 W. C. L. J. 1332.

either by word or act which would lead the insurer to arrive at any different conclusion. The court held that the insurer was estoppel to deny its liability when the Industrial Board found it liable for the compensation awarded for the death of an employee engaged on the independent operations of the subcontractor, and a claim that the policy covered only those employees engaged in subcontract work came too late.[64]

The mere collection of the balance of an earned premium will not estop an insurance carrier from contesting its liability under an insurance policy. So where a policy contained a clause stating that upon transfer of interest the policy would become void, the insurance carrier was not liable for an accident which occurred during the time between the transfer and the issuance of a new policy.[65]

Where an insurance company, more than two months after a cancellation of a policy, which was effected by the giving of a proper notice, which never reached the employer, sent its representative to check the pay rolls of the insured, in order that it might ascertain the amount of premiums due, it was not thereby estopped from asserting the cancellation of the policy in proceedings for compensation.[66]

Where an insurance company knew that claimant was president of a corporation and owned 95 per cent of the stock, but still included his salary in the pay roll upon which the premium was based, the court, in holding that the insurance company was estopped to deny that he was an employee, said: "The insurer, by treating the claimant as an employee and including his salary in the pay roll as a basis for the premium, may not now be in a position to deny that he was an employee."[67]

64. Brown v. Bouschor et al., 207 Mich. 594, (1919), 175 N. W. 129, 5 W. C. L. J. 260.

65. Kolb v. Brummer, 185 App. Div. 835, 173 N. Y. S. 72, 18 N. C. C. A. 573.

66. Skoczlois v. Vinocour, 221 N. Y. 276, 116 N. E. 1004, 15 N. C. C. A. 765, Modifying 176 App. Div. 924, 162 N. Y. S. 1144.

67. Kennedy v. Kennedy Mfg. & Eng. Co., 177 App. Div. 56, 163 N. Y. S. 944, 15 N. C. C. A. 771.

But where at the time the policy was written the claimant was the wife of one of the partners and in the employment of the firm, but thereafter her husband acquired the entire interest in the partnership, and claimant continued to work for him, and was injured, the court held that the insurance company was not estopped to deny that she was an employee within the meaning of the act, since it had in no way induced her to change her position.[68]

Where an insurance carrier issued a policy to a corporation which was not organized for pecuniary profit, but did conduct a business, it was held that since the insurance carrier knowingly received the premium on a policy upon a corporation operating for pecuniary profit in hazardous employments it is estopped to deny its liability.[69]

Where an employer and insurance carrier alleged in an answer that they were ready and willing to pay reasonable hospital and medical expenses due under the compensation act, they are estopped from thereafter setting up as a defense to the claim for such service that their own physician was willing to perform the services.[70]

Where an insurer issues a policy covering the employees of a Nebraska Corporation, reciting that it is issued under the Nebraska compensation act and the place of business is "South side of Carter Lake adjacent to Omaha, Nebraska; consisting of 55 acres," and it accepts and retains the premium money, it is estopped to deny liability to employees hurt on the described premises, upon the plea that such premises were in the state of Iowa and that it did not insure against accidents not occurring within the state of Nebraska.[71]

68. In re Humphrey, 227 Mass. 166, 116 N. E. 412, 15 N. C. C. A. 771.

69. Uhl v. Hartwood Club, 177 App. Div. 41, 163 N. Y. S. 744, 15 N. C. C. A. 771, Affirmed in 116 N. E. 1000.

70. State ex rel. John Wunder Co. v. District Court of Hennepin Co., 136 Minn. 147, 161 N. W. 391, 15 N. C. C. A. 118.

71. Venuto v. Carter Lake Club, — Neb.—, (1920), 178 N. W. 760, 6 W. C. L. J. 544.

Where the insurance carrier defends an action for the employer and takes all the adverse steps in the proceeding, although not formally on the record as a party, it is estopped to deny that it is bound by the court's order.[72]

§ 471. **Where Employer is in Default in his Payments to the State Insurance Fund or has Permitted his Policy to Lapse.**—The common-law right of action of an employee, who would otherwise come under the Washington Workmen's Compensation Act, is not, in view of the amendment of 1917, preserved to him in case of the employer's default in payments into the state insurance fund. The amendment, Rem. Code 1915 Section 6604-8, makes provision for an action in the name of the state for the enforcing of such deliquent payments and the employee's only remedy, in case of injury in an extra hazardous employment, is under the compensation act.[73] The Ohio Act was also amended as to the above in 1920 Section 1465-75, to make corporate officers personally liable.

Under the Indiana Act, as under the provisions of some of the other acts, failure of the employer to keep his compensation risk properly insured, subjects him to the liability of a suit for damages at common law with his common-law defenses, contributory negligence, negligence of fellow servant, and assumption of risk, removed.[74]

Employers and insurance carriers in default of payments to injured employees are entitled to no consideration under the Indiana Act where they are in default in payment of compensation.[75]

§ 472. **Validity of a Provision of the Act Requiring Payment into a Special Fund.**—The provision of the New York act requiring an employer, in the absence of dependents upon a deceased em-

72. Chase v. Emery, — Pa. —, (1921). 113 Atl. 840.

73. Gowey v. Seattle Lightning Co., 108 Wash. 479, 184 Pac. 339, 4 W. C. L. J. 752.

74. Talge Mahogany Co. v. Burrows, —Ind.—, 130 N. E. 865.

75. Lambert v. Powers, —Ind. App.—, (1921), 131 N. E. 420.

ployee, to pay $100.00 into the state fund for the purpose of creating a special fund out of which additional compansation might be paid in certain cases, was held not to be violative of article 1, section 19, of the state constitution.[76]

§ 473. **State Funds.**—The state treasurer is made custodian of the North Dakota Workmen's Compensation fund which is accumulated in the manner prescribed by law for the payment of claims allowed by The Workmen's Compensation Bureau. The fund accumulated for this purpose is a special and not a public fund, and when a claim has been presented to the bureau by one claiming compensation and such claim is allowed, the bureau, under the provisions of the act, may draw its voucher against the treasurer as custodian of such fund, directing the state treasurer to pay the amount stated in the voucher warrant. Under the act the auditor has no authority to issue a warrant for the payment of any award made by the compensation bureau.[77]

An act which establishes a state fund as the exclusive source of compensation and compels all employers to contribute thereto is not unconstitutional because of these provisions.[78]

Where a servant's judgment against a third person has been affirmed the judgment debtor cannot complain that the lower court ordered the amount of the judgment to be marked to the state fund's use, upon petition of the latter.[79]

§ 474. **Where Act Provides that Compensation shall be Payable but Makes no Provision for Raising a Fund to Pay the Com-**

76. State Industrial Commission v. Newman, 222 N. Y. 363, 118 N. E. 794, (1918), 18 N. C. C. A. 567, Aff'd 179 N. Y. App. Div. 481, 165 Supp. 967; State Industrial Comm. v. Edsall, 222 N. Y. 651, 119 N. E. 1079, 18 N. C. C. A. 567.

77. State ex rel. Stearns v. Olson, —N. Dak.—, (1919), 175 N. W. 714, 5 W. C. L. J. 574.

78. Mountain Timber Co. v. State of Washington, 243 U. S. 219, 61 L. Ed. 685, 37 Sup. Ct. Rep. 260, 13 N. C. C. A. 927; Thornton v. Duffy, 41 Sup. Ct. R. 137.

79. Mayhugh v. Somerset Telephone Co., —Pa.—, 109 Atl. 213, 5 W. C. L. J. 891.

pensation.—The fact that the Compensation act provides that school districts shall pay compensation to injured employees, but makes no provision authorizing the raising of a fund for the purpose of meeting such payments, will not relieve the district from liability. The amount of compensation is payable out of the funds raised by taxation, and the fact that these funds partake of the nature of a trust fund is immaterial.[80]

§ 475. **Intervention.**—Where an insurance carrier failed to intervene in proceedings as an interested party or appear as a party, except to file an answer and appeal for the employer, the court in disposing of the appeal said: "Orderly procedure requires that a party claiming to be interested in a proceeding conducted under the workmen's compensation act shall make himself a party to the record by asking to intervene, unless it affirmatively appears from the record itself that he is actually a party in interest. As the record in the case before us discloses no right of appeal in the appellant, appellee's contention that its appeal be quashed must prevail."[81]

In a Texas case prior to the amendment of 1917, C. 103, par., 4, section 2, where an insurance carrier sought to intervene on the grounds of subrogation to the rights of an employee who was injured through the negligence of a third party and elected to take under the compensation act, the court said: "When the casualty company insured the Burton Lumber Company in principle it occupied the same position as regular insurance companies. Under the compensation act it is denominated an insurance company, and we see no reason why the laws and decisions of this state relative to other kinds of insurance do not apply to it. We are of the opinion that appellant in issuing this policy of insurance took the risk of not having anything to pay, and, having lost, it must stand the consequences."[82]

80. Woodcock v. Board of Education of Salt Lake City, —Utah—, (1920), 187 Pac. 181, 5 W. C. L. J. 620.

81. Bolden v. Greer, 257 Pa. 513, 101 Atl. 816, 15 N. C. C. A. 774.

82. Texas & P. Ry. Co. v. Archer, —Tex. Civ. App.—, 203 S. W. 796, 18 N. C. C. A. 587.

§ 476. **Right of an Insurer to Object to an Agreement for Compensation.**—An employer and the dependent of deceased entered into an agreement for compensation, and filed the same with the commission for its approval. The insurance carrier objected to such approval, claiming that the death was not attributable to the injury. The court, unanimously affirming an award based upon the agreement, said: "It is now urged that the insurance carrier having indicated its dissatisfaction with the agreement before the same was approved by the commission, the latter could not thereafter give its approval. The latter statute (section 20) does not make the approval of the commission depend on the consent of the insurer, nor even on the consent of all of the claimants, but only on the consent of the employer and principal dependent. The approval of the commission was therefore properly given, even though the insurer had protested more vigorously than it seems to have done in this case, and by the mandate of the statute 'such approval shall constitute an award.' Of course the insurer is entitled to a hearing, and without such hearing, such award could not be deemed conclusive as to the insurer. But the insurer in this case has had such hearing."[83]

§ 477. **Effect of Revocation of Insurance Carrier's Authority.**—The court, in holding that a revocation of an insurance company's authority to do business within a state after an accident had happened, would not preclude the service of a notice upon the carrier, as a prerequisite to absolving the employer from liability, said: "We are satisfied that this fact cannot be held to affect the rights of petitioner. The law clearly requires that the employer shall be relieved from all liability for compansation 'if at the time of the suffering of' the injury for which compensation is claimed he is insured against liability for the full amount of compensation payable, or that may become payable, by an insurance carrier then authorized to insure him under the laws of the state. It is the situation at the time of the suffering of the injury that controls as to relief from liability. Assuming for the

83. Schlenker v. Garford Motor Truck Co., 183 App. Div. 166, 170 N. Y. S. 439, 18 N. C. C. A. 580.

purposes of this decision that the notice must be served and filed by the employer in all respects as provided in section 34 of the act before exemption from liability can be claimed, it is clear that the fact that the insurance carrier is, subsequent to the suffering of the injury, deprived of its right to further transact such insurance business in the state, cannot be held to deprive the employer of the right to make any service of notice upon it that is essential to full compliance with the terms of the section."[84]

§ 478. **Satisfaction of an Award.**—Where an insurance policy called for payment in money only, and the employer paid the compensation in part by deeding land to the employee, the court held that there had been a substantial compliance with the provision of the policy, there being no evidence of collusion or bad faith and that the employee desired to purchase the land.[85]

§ 479. **The Right of an Insurance Carrier to Attack an Award Collaterally.**—In holding that an insurance carrier could not deny, in a collateral attack, that claimant was in the employ of the persons against whom the award was made, the court said: "The original findings and award declared that Kelly was in the employment of both Manley and Marks at the time of his injury. This finding and award was not attacked by any proceeding in review, as provided in the act, and it had become final long before the new proceeding was begun. It was conclusive upon the parties with regard to their relation to the injured person."[86]

A surety, on a certiorari to review a judgment for compensation, is liable for the payment of the entire judgment even though the award called for the payment of the award in weekly installments, and the insurer or surety cannot attack the court's

84. Weiser v. Indus. Comm., 172 Cal. 538, 157 Pac. 593, 15 N. C. C. A. 767.

85. Komula v. Gen. Acc. Fire, and Life Ins. Corp. Ltd. of Perth, Scotland, 165 Wis. 520, 162 N. W. 919, 15 N. C. C. A. 773.

86. Massachusetts Bonding & Insurance Co. v. Indus. Comm., 176 Cal. 488, 168 Pac. 1050, 18 N. C. C. A. 580.

ruling indirectly, but must proceed in a direct action to obtain the relief sought.[87]

§ 480. **Reformation or Amendment of Policy.**—Where by mutual mistake a policy was made to include a business not intended, and after an accident the assured and insurance carrier mutually agreed that the policy was to be limited in its operation to the business it was originally intended to cover, which business was not the one wherein the employee was engaged at the time of his accidental death, the court annulled an award against the insurance carrier, saying: "It is true that the parties to this contract of insurance could not amend the policy after an accident, to defeat the rights of compensation that had accrued before the amendment, and if the addition to the contract was in fact an amendment of the policy of insurance by mutual consent, the rights of Mrs. Coulter (claimant widow) could not be affected thereby. If, however, the policy issued differed from that actually contracted for, and by mutual mistake of the parties expressed an agreement not intended by them, there is no reason why they could not correct the provisions of the policy to state their actual intent, unless for some reason they would be estopped from doing so. There is no showing here that any of the parties whose rights are involved ever knew of the existence of this policy previous to the accident, or acted upon it any way."[88]

Where through error a policy was issued to a member of a partnership in his individual capacity instead of to the partnership, and after an award was made against the individual member in favor of an injured employee the partnership voluntarily paid the award, and brought an action for the reformation of the policy and to recover the amount paid from the insurance company, the court, in granting the relief requested, held that a court of equity had jurisdiction to reform the policy, that the

87. Carlson v. American Fidelity Co., —Minn.—, (1921), 182 N. W. 985.

88. Employers' Liab. Ass. Corp. Ltd. of London, England v. Indus. Comp., 179 Cal. 432, 177 Pac. 273, (1919). 18 N. C. C. A. 579.

partners under the circumstances were not estopped by their conduct with reference to the policy, and that their failure to notice the error in the policy was excusable since it appeared that the partners were Finlanders, only one of whom could read English.[89]

§ 481. **Right to Sue Insurance Carrier.**—Under the Texas act, an employee of a subscribing employer must look to the Texas Employer's Insurance Association for Compensation. The act further provides that the term "Association" shall mean any Insurance company authorized under the act to secure the payment of compensation. So, where it was contended that the employee was not authorized to sue the insurance carrier, the court said: "The law therefore expressly authorizes the suit by the employee against the insurance company, as here. And the terms of the particular policy, as alleged, may not be so construed, it is thought, as to not authorize suit thereon by and in the name of the injured employee."[90]

Where an award had been made against an employer and he failed to pay any part thereof, the industrial commission commuted the award to a lump sum and ordered suit to be brought against the insurance, carrier. The carrier applied for a restraining order, basing its claim on the ground that it was only secondarily liable for any award made against the petitioner. In overruling this contention the court said: "But according to the express terms of the insurance policy, as well as of the New York Workmen's Compensation Law, under which it was issued, the Casualty Company is primarily liable upon its direct obligation. Indeed, its counsel admitted at the hearing that under no circumstances could the Casualty Company have recourse to the Merritt & Chapman Derrick & Wrecking Company for any payment made under the policy. The Casualty Company, under its policy, undertook to pay the compensation that might be awarded against the employer. The State Industrial Commission has

89. Komula v. Gen. Acc. Fire & Life Assur. Corp. Ltd. of Perth, Scotland, 165 Wis. 520, 162 N. W. 919, 15 N. C. C. A. 770.

90. Fidelity & Casualty Co. of N. Y. v. House, — Tex. Civ. App. —, 191 S. W. 155, 15 N. C. C. A. 772.

brought suit on that policy, in accordance with its right under the workmen's compensation law. If the Casualty Company has any defense, it may be urged in that suit."[91]

The relation of insurer and insured must exist as a prerequisite to an action by the injured employee against the insurer.[92]

§ 482. **Fraud in Securing Policy.**—In a New York case, wherein rehearing was sought to retry an issue of fraud in procuring a policy, the opinion of the court in full is as follows: "The claim was heard before the commission and the hearing, March 22, 1915, resulted in an award. The appellant made a motion, July 6, 1917, for the reopening of the case upon the ground that the accident occurred before the policy was issued upon the statement that no accident, except a trival one (other than this), had occurred, and that the policy was therefore obtained by fraud. The appellant made the same contention before the commission upon the original hearing. It is true the commission did not set aside the policy for fraud, but ruled that it would not go into the question of the fraud so long as the policy had in fact been issued. No new fact is presented to the commission upon this motion, except that since the decision the commission has determined as to the legality of policies and the court seems to sustain such practice. Matter of Skoczlois v. Vinocour, 221 N. Y. 276, 116 N. E. 1004, 15 A. C. C. A. 765.

"If timely appeal has been taken, the question may be considered and justice done on the appeal. If the appellant has allowed its time to appeal to expire the award is conclusive against it under section 23, of the law, and it should not, therefore, be accorded the right of a review under the name of a rehearing. Unless the award is reversed on appeal, it should stand. The determination appealed from is therefore affirmed. All concur."[93]

91. The Cascade, 241 Fed. 206, 15 N. C. C. A. 772.

92. U. S. Fidelity & Guaranty Co. v. Nelson, — Tex. Civ. App. —, (1921), 228 S. W. 616.

93. Clemens v. Clemens & Grell, 180 App. Div. 92, 167 N. Y. S. 519, 15 N. C. C. A. 775.

§ 483. **Lump Sum Agreements.**—An insurer is bound by a lump sum agreement entered into between an employer and an employee providing it is for a fair and reasonable sum, and made in good faith in accordance with the provisions of the statute.[94]

§ 484. **Notice as a Prerequisite to Liability.**—Defendant's liability to pay compensation under its contract of employers' liability insurance did not depend upon notice of the contract by the defendant to the Industrial Board prior to the injury.[95]

Notice to an employer is, under the Texas act, notice to the insurer.[96]

§ 485. **Transfer of Interest as Releasing Liability of Insurance Carrier.**—A provision in a policy rendering it void upon transfer of interest, is a reasonable regulation. So where an employer died leaving by will his business to his wife, and upon his death she applied for a transfer of the insurance, but during the interim between the application and actual issuance of a new policy, an accident occurred whereby an employee was injured, the court held that the insurance carrier was not liable. The mere collection of earned premium by the insurance company did not estop the carrier from contesting its liability under the contract and while the commission had power to determine whether the policy existed, it must determine the question on recognized legal principles.[97]

§ 486. **Power of Industrial Commission to Fix Insurance Rates.**—Where an employer and insurance carrier entered into a contract whereby the latter agreed to carry the employer's risk at a certain rate, and one clause provided that the policy should

94. Bailey v. U. S. Fidelity & Guaranty Co., 99 Neb. 109, 155 N. W. 237. See § 506.

95. Southwestern Surety Ins. Co. v. Curtis, 200 S. W. 1162, 1 W. C L. J. 875.

96. Home Life and Acc. Co. v. Orchard, —Tex. Civ. App.—, (1921), 227 S. W. 705.

97. Kolb v. Brummer, 185 App. Div. 835, 173 N. Y. S. 72, 18 N. C. C. A. 573.

be a participating policy, the industrial commission refused to accept, recognize, or file the agreement, because the rate of the risk as fixed by the industrial commission was higher than that provided for in the agreement and because of the participating clause. Proceedings were brought against the commission in which the constitutionality of the provision giving the commission the power to fix rates, was attacked on the grounds that it interfered with property rights and the right to contract. The court held that such powers as given to the commission were not violative of any constitutional rights, and when a rate had been determined, it *ipso facto*, became the established rate for all insurance companies doing business under the act, and the commission was justified in rejecting the policy on these grounds, and because of the participating clause which was uncertain and indefinite. On the latter point the court said: "If the law in question is to consummate the beneficent purpose for which it was intended, the first requisite, so far as the insurance feature is concerned, is to take every precaution within the power of the commission to protect the fund from which compensation is to be paid. Of what avail is the fixing of a rate of insurance, based upon careful estimate with the view of maintaining the solvency of the fund from which compensation is to be paid, if the insured and insurer by means of an uncertain, indefinite clause in the policy can evade the spirit and intention of the law."[98]

§ 487. **Industrial Commission's Jurisdiction.**—In deciding the question of the Industrial Commission's Jurisdiction the California Supreme Court said: "The insurance carrier set up in its answer the defense that there had been a breach, on the part of Johnson, the employer, of certain warranties contained in the policy, and that upon learning of such breach the insurance company had canceled the policy. It is argued that the issues involved in this defense were such as could be determined only by a court of law in an action upon the policy and that the commission was without jurisdiction to pass upon them. We do not

98. Scranton Leasing Co. v. Indus. Comm. of Utah, 51 Utah, 368, 170 Pac. 976, 18 N. C. C. A. 573.

agree to this contention. The Industrial Accident Commission is no doubt a tribunal of limited jurisdiction. Its powers do not extend beyond the 'settlement of any disputes arising under the legislation contemplated by' section 21 of article 20 of the Constitution. Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 410, 156, Pac. 491, Ann. Cas. 1917 E. 390. That section authorizes the Legislature to 'create and enforce a liability on the part of all employers to compensate their employees for any injury incurred by the said employees in the course of their employment. * * *' This court is committed to the view that the language just quoted is to be read in the light of a liberal interpretation. A scheme of insurance for the protection both of the employer and the employee has been a part of virtually every workmen's compensation statute enacted in other jurisdictions prior to the adoption of our own constitutional provision. To permit the employer to limit his obligation by procuring an insurer private or governmental to assume the burden of payment, and at the same time to give the workman a direct right of recovery against the insurer, is, we think, a mode of defining the extent of the employer's liability and therefore embraced within the power to 'create and enforce' such liability. The insurer, assuming the risk voluntarily, is in privity with the employer, and stands in his place. An adjudication of liability under the policy is a settlement of dispute arising out of the liability of the employer to his employee. The right of the commission to make an award against the insurer, where the validity of the policy is conceded, has never been questioned. If the commission may, in any case, make an award against one who has agreed to stand in the employer's place and protect him against claims by his employees, it must have the power to determine all questions of law and fact upon which the liability of the alleged insurance carrier depends. To hold that the mere denial of the binding force of a policy deprives the commission of jurisdiction would introduce endless and unnecessary complications and difficulties into the administration of the law.''[99]

99. Employers' Liab. Assur. Corp. v. Indus. Comm.., 177 Cal. 771, 171 Pac. 935, 2 W. C. L. J. 25.

Where it was contended that the commission did not have the power to determine whether the policy had been cancelled the court said: "I think it had jurisdiction of the subject-matter and the power to make such determination. The act seems, inferentially at least, to confer such power. Under section 20 the commission is given full power and authority to determine all questions in relation to the payment of claims, and under section 23 an award made by it is final and conclusive upon all questions within its jurisdiction as against the state fund or between the parties. Section 26 (amd. L. 1915, c. 167) expressly provides that:

'If payment of compensation due under the terms of an award, be not made by the employer within ten days after the same is due, the insurance carrier shall be liable therefor.'

"Subdivision 1 of section 54 provides, in substance, that every policy issued by an insurance company covering the liability of the employer shall contain a provision setting forth the right of the commission by making the insurance company a party to the original application to enforce the liability against it. It would seem necessarily to follow that if the insurance company may be made a party to the original application to the commission for compensation, all its rights may be litigated, and determined precisely the same as those of the employer. The latter can raise the question, and have it determined as to whether the relation of the employer and employee existed at the time the accident occurred, and for the same reason I think the insurance company can raise and have the question determined as to whether there was then a valid outstanding policy issued by it. If such questions be raised, then the determination of them lies with the commission. This view is strengthened by subdivision 2 of the same section, which provides: 'That jurisdiction of the employer shall, for the purpose of this chapter, be jurisdiction of the insurance carrier and that the insurance carrier shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the employer for the payment of compensation under the provisions of this chapter.' In order

to give full effect to the provisions of the statute referred to, it seems to me necessarily to follow that the legislature intended the commission should have power in the first instance to determine whether a policy of insurance covering the liability of the employer was in force when the accident occured, and if so, the liability of the insurance company under it. Matter of Kelley (Ind. App.) 116 N. E. 306, 308. Unless this be the correct view of the statute, the scheme contemplated by it fails, to a large extent at least, of its purpose.''[1]

1. Skoczlois v. Vinocour. 221 N. Y. 276, 116 N. E. 1004, 15 N. C. C. A. 765.

CHAPTER XI.

MEDICAL BENEFITS.

Sec.
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§ 488. **General.**—The acts of most states provide for reasonable or necessary medical, surgical and hospital services at the employer's or insurer's expense, but limited as to time, and amount, and leaving, within certain limitations, the question of reasonableness or adequacy to be determined by the commissions or courts.[2]

2. Fischer v. W. F. Prisbe Co., 178 Ia. 512, 160 N. W. 48.

See the following sections of the respective acts. Missouri section 13. sixty days and 250 dollars; Illinois, section 8(a), eight weeks and 200 dollars with provisions for the extension of such limits; Iowa, section 2477-m 9(b), four weeks and 100 dollars with provisions for extension to additional 100 dollars; Kansas, section 5905, fifty days and $150;* Kentucky, section 4, ninety days and $100 but 200 in case of operation for hernia; Nebraska, section 3661-111, no time limit, amount $200;*[1] Oklahoma Art. 2, section 4, sixty days amount $100 with provision for extension of limits; Tennessee, section 25, thirty days and $100.

There has been considerable discussion of the question of the employee being given the right to choose his own physician at the employer's expense. The arguments in favor of so doing are founded upon sentimental reasons rather than practical experience which has demonstrated that the main purpose to be accomplished by the medical benefits provisions of the acts, namely, to cure and relieve the employee from the effects of the injury as quickly as possible, and at reasonable expense, is more often better accomplished by the employer being given the right to select the physician. The employer is, as a rule, more competent to judge the efficiency of the doctor employed, and to provide efficient medical and hospital treatment at a considerably lower average cost. It is also to the interest of the employer to furnish the very best medical and surgical treatment in order to minimize the result of the injury. Malingering can be better controlled and prevented when the employer has supervision over the medical service, as in this manner he gains complete knowledge of the condition of the injured man, to which he should be entitled, inasmuch as he pays the expense of the service.

Numerous cases are on record in which injuries that should have received the attention of highly skilled surgeons, were treated by family physicians without surgical practice and often wholly incompetent Such treatment is frequently detrimental to the injured workman and costly to the employer.

The danger of the incompetency of the doctor furnished by the employer is usually guarded against by the right given to the compensation commission to order a change of physicians, and the further fact that it is greatly to the employer's interest to provide such medical service as will most quickly discharge the injured employee from the paid but non-producing rank. In discussing this question the Supreme Court of Wisconsin said: "Thus, the burden for all reasonable medical aid and surgical treatment, medicine, etc., is cast on the employer, limited as to

* Cain v. National Zinc Co., 94 Kan. 679, 148 Pac. 251; Ruth v. Witherspoon-Englar Co., 98 Kan. 179, 157 Pac. 403.

*1 Epsten v. Hancock Epsten Co., 101 Neb. 442, 163 N. W. 767; Radil v. Morris & Co., 103 Neb. 84, 170 N. W. 363.

time, with the very wise and necessary safeguard against imposition that the choice of the medical or surgical attendant shall be left with him and that, if the injured person unnecessarily chooses his own physician, he will do so at the peril of having to bear the burden of the expense. That is a very valuable protection to injured persons as well as to employers. The natural effect of a firm enforcement of it will be to expedite the return of honest claimants to the walks of industry and prevent them from having their misfortunes exploited for others' benefit. If the advantages to be gained by a firm administration of such provision would be greater on one side than on the other, it is the side of the employees. Therefore, in case of a personal injury to an employee in line of his duty, the law should be construed and applied so as to secure to his employer reasonable opportunity to conserve the mutual interests of the two parties to the misfortune by supplying the medical and surgical needs of the injured."[3]

§ 489. **Employer's Duty to Furnish Medical Aid.**—It is necessary to examine the exact wording of the particular act in order to determine the full scope of the duty of the employer or the rights of the injured employee under the medical benefits provisions of the various acts. As a general rule it is the affirmative duty of the employer to provide the necessary medical treatment for the employee injured in an accident arising out of and in the course of the employment. A mere passive willingness to provide it if requested, is not sufficient.[4] It must be brought to the attention of the employee that such services are available to him,[5] as where the employer posted notices conspicuously, in his manu-

3. City of Milwaukee v. Miller, 154 Wis. 652, 144 N. W. 188, 4 N. C. C. A. 149 L. R. A. 1916A1, Ann. Cas. 1915 B 847; In re Panazuk, 217 Mass. 589, 105 N. E. 368.

4. Bradbury v. Waterbury Clock Co., 1 Conn. Comp. Dec. 179; Miller v. California Stevedore & Ballast Co., 1 Cal. I. A. C. (part 1) 154.

5. State ex rel. John Wunder Co. v. District Court of Hennepin Co., 136 Minn. 147, 161 N. W. 391, 15 N. C. C. A. 119.

factory, which gave the name and location of the hospital where medical and hospital attendance were furnished for injured employees, these notices were held amply sufficient to defeat the employee's claim for medical expense incurred elsewhere on account of his failure to avail himself of the employer's offer expressed in the notices.[6] But it was held otherwise where a foreigner, who was unable to read these notices, but who informed his foreman of his injury, and, receiving no information as to his rights with regard to medical attention, called in a physician of his own selection. The following statement by the court in this case will apply to most of the American Compensation acts except as to the time limit therein mentioned: "The obligation to furnish medical and hospital services for the first two weeks after the injury, is imposed on the insurer by the express words of the act. This duty must be performed or reasonable efforts made to that end before the statutory obligation is satisfied. 'Furnish' means to provide or supply. Its significance may vary with the connection in which it is found. It is used here to describe a duty placed upon an insurer respecting a workman who receives 'a personal injury arising out of or in the course of his employment.' Such a person is manifestly presumed by the act to be under more or less physical disability and hence not in his normal condition of ability to look out for himself. The word 'furnish' in this connection imports something more than a passive willingness to respond to a demand. It implies some degree of active effort to bring to the injured person the required humanitarian relief. Reasonably sufficient provision for rendering the required service must of course be made. Then either express notice must be given to the employee or there must be such publication or posting of the information as warrants the fair inference that knowledge has reached the employee. If the insurer has made adequate arrangements for the care of those to whom the duty is owed in the event of injury, and then by conspicuous notices suitably posted in places frequented by the employee in a lan-

6. In re Davidson, 228 Mass. 257, 117 N. E. 310, 15 N. C. C. A. 117; Pecott's Case, 223 Mass. 546, 112 N. E. 217.

guage capable of being read by him, had given full information of that fact, and directions as to steps to be taken by an injured person in order to avail himself of these arrangements, a very different question would be presented. This might go a long way toward proving compliance with the requirement of the statute."[7]

It has been held that where an employer authorized a physician to continue treatment beyond the statutory limit of time, the insurer was liable for the physician's fees by reason of the statutory provision authorizing the employer to furnish medical aid beyond the statutory period.[8] A similar liability may rest upon the employer where, in a serious case, the employer directs the physician to give the employee close attention, which he continues to do after the statutory time limit.[9] It has also been held that where, through the employer's fault, necessary medical or surgical service was not furnished within the time limited by the act and because of that fact such services were required after the time limited by the act, the employer is liable for the expense thereof.[10] The contrary view is held in Michigan, where it was claimed that at the time of the accident the employer's physician did not properly examine and treat the injured employee;[11] also in a California case where it was claimed that the employer's physician did not properly set an employee's broken bone.[12]

7. In re Panazuk, 217 Mass. 589, 105 N. E. 368, 5 N. C. C. A. 688; Cella v. Indus. A. C., 38 Cal. App. 760, 177 Pac. 490, 18 N. C. C. A. 385.

8. In re Kelley, 64 Ind. App.—, 116 N. E. 306, 15 N. C. C. A. 120; Kirkhoff Bros. v. McCool, 64 Ind. App. —, 116 N. E. 429, 15 N. C. C. A. 120.

9. In re Meyers, 64 Ind. App.—, 116 N. E. 314, 15 N. C. C. A. 121.

10. In re Henderson, 64 Ind. App.—, 116 N. E. 315, 15 N. C. C. A. 124. But see Born & Co. v. Durr, 64 Ind. App. —, 116 N. E 428, 15 N. C. C. A. 123.

11. McMullen v. Gavette Const. Co., 200 Mich. 203, 166 N. W. 1019, 18 N. C. C. A. 386, 1 W. C. L. J. 1006.

12. Foreman v. Hunter Lumber Co., 36 Cal. App. 763, 173 Pac. 408, 18 N. C. C. A. 386. See also Ellamar Mining Co. of Alaska v. Possus, 247 Fed. 420, 1 W. C. L. J. 723.

In a California case the employer was held liable for the reasonable value of necessary medical attention, in the absence of a definite offer to furnish the same and the refusal of the employee to accept the medical service offered.[13] So where an employer and his insurance carrier did not tender medical attention for a hernia, in a case in which it was caused by accidental injury, the employer and insurance carrier were held liable for the cost of an operation to reduce the hernia.[14]

Where an employee froze his fingers and notified his employer thereof who advised the employee to see a doctor, but failed to tell the employee that the employer would pay the expense, and by reason of that fact the employee failed to seek medical advice, thereby prolonging his disability, it was held that the employee's conduct was not unreasonable and that he was entitled to compensation.[15]

In emergencies, where it is necessary to obtain the services of a physician without delay, it is not incumbent upon the employee to waste time by first notifying the employer. The latter will be held liable for the emergency medical treatment rendered by the physician selected by the injured employee. The Supreme Court of Michigan, in discussing this question in a recent case, said: "Unquestionably that construction of the statute is logical, and the adopted rule sound, which requires notice and opportunity to the employer to select the physician and furnish the needed service during the prescribed three weeks before the injured party can secure the same at the employer's expense, but in the many complications which arise in industrial activities it is not an unreasonable or strained construction of the statute, in view of its purpose, to recognize as inferable exceptions in extraordinary cases where the surrounding circumstances and critical condition of the injured party present emergencies, or exigencies demanding prompt action which reasonably warrant the injured

13. Trueblood v. County of Los Angeles, 2 Cal. I. A. C. 914; Rainey v. Tunnel Coal Co., 93 Conn. 90, 105 Atl. 333, 3 W. C. L. J. 227.

14. Viglione v. Montgomery Garage Co., 2 Cal. I. A. C. 107.

15. Rainey v. Tunnel Coal Co., 93 Conn. 90, 105 Atl. 333, 18 N. C. C. A. 385, 3 W. C. L. J. 227.

party in securing the then needed service at the employer's expense without first giving notice and opportunity to furnish or offer the same. Such cases are, of course, distinctively exceptional and consequently rare. Where such exception is claimed, the question of pressing necessity demanding and excusing prompt action before reasonable time for notice and opportunity thereafter for the employer to act becomes primarily an issue of fact. There is testimony in this case to support the conclusions of the board in that particular."[16]

Where a hospital is maintained by Indiana tribal funds it is entitled to pay for treatment furnished to injured employees.[17]

Upon an employer receiving knowledge of the necessity for medical aid, it is his duty to furnish such aid as is required. And evidence that an employee told the superintendent that he wanted to go to a hospital, and that the superintendent told him that he could go at his own expense, was sufficient to establish knowledge on the part of the employer, and he is estopped to deny knowledge of the necessity for medical services.[18]

Under the provision of the Pennsylvania Act, requiring an employer to furnish medical aid for the first fourteen days after disability, a coal company which knowingly permitted an employee to be moved to a hospital without objection, performed its legal duty and is liable for the hospital bill even though the act requires the hospital to furnish free service to miners, no formal request on the part of the employee being necessary.[19]

§ 490. **Neglect, Failure or Refusal of Employer to Provide Medical Treatment.**—As a general rule the employer's neglect or

16. Gage v. Pontiac State Hospital, 206 Mich. 25, 172 N. W. 536, 4 W. C. L. J. 247; In re Pecott, 223 Mass. 546, 112 N. E. 217, 15 N. C. C. A. 118; Fernandez v. Mountain Copper Co., 5 Cal. I. A. C. 110; In re R. C. W. Hitch, 2nd A. R. U. S. C. C. 231.

17. Decision of Federal Commission, Oct., 1917, 2nd A. R. U. S. C. C. 207.

18. Chicago Sandoval Coal Co. v. Indus. Comm., —Ill.—, (1920), 128 N. E. 567, 7 W. C. L. J. 34.

19. Trustees of State Hospital etc. v. Leigh Valley Coal Co., —Pa. —, 110 Atl. 255, 6 W. C. L. J. 214.

failure to promptly provide medical treatment renders him liable for the reasonable value of such services when procured by the employee. As in a case where an injured employee was dissatisfied with the advice given him by the surgeon first selected by the insurer, and was then directed to go to another physician who happened to be out of town, and the employee then went to his family physician for treatment, the insurer was liable for such treatment on the ground of having neglected to provide the surgical treatment reasonably required.[20]

It has been held that where the employer has notice or reason to believe that medical treatment is necessary and he does not seasonably offer the same, he will be liable for the expense of such treatment necessarily incurred within the time limit of the act;[21] that the claim for medical treatment given the employee could not be defeated on the ground alone that the physician of the employer and insurer was ready to perform the services;[22] that the compensation board has no "authority to award as damages the amount paid for such services after the time limited in the act, upon the theory that the failure to furnish proper medical and hospital services created a liability for the payment of such services performed which may be awarded by the board as damages;"[23] that where the employer's insurer did not in advance make arrangements with a hospital to furnish treatment to an injured employee, nothing more having been done than to direct the employee, through notices posted on the premises, to go to an open hospital, the insurer was liable to physicians for medical services rendered by them to the employee after the injury;[24] that under the New York Act the master cannot set up the servant's failure to demand medical attendance, where it knew that the servant was in the hospital and paid the bill;[25]

20. Massachusetts Bonding Co. v. Pillsbury, 170 Cal. 767, 151 Pac. 419.

21. Peres v. Wand, 1 Cal. I. A. C. Dec. 607; Leadbettor v. Industrial Acc. Comm., 179 Cal. 468, 177 Pac. 449, 18 N. C. C. A. 382, 26 Cal. App. 1268.

22. State ex rel. John Wander Co., 136 Minn. 147, 161 N. W. 391.

23. McMullen v. Gavette Const. Co., 200 Mich. 203, 166 N. W. 1019, 1 W. C. L. J. 1006.

24. In re Ripley, 229 Mass. 302, 118 N. E. 638, 1 W. C. L. J. 622.

25. Junk v. Terry etc., Co., 176 App. Div. 855, 163 N. Y. S. 836.

though where the employee is able to make the request for medical service and fails to do so the employer is relieved from liability under the New York Act.[26]

If the physician selected by the employer prematurely discharges the injured employee, the employer must pay the expense of the further medical service procured by the employee.[27]

When it can be shown that the services furnished by the employer are inadequate or inefficient, the employee is justified in changing to his own physician, and he will be allowed the reasonable costs of the services.[28] Some acts provide that permission must first be obtained from the board or commission.

Where the employer's physician, being called twice by the employee because the injured member he had been treating had become swollen, and without seeing its condition refused to attend, saying it was unnecessary, and the employee then procured his own physician, the employer was liable for the expense of the employee's physician.[29]

It has also been held that to furnish a chiropractor is not a compliance with the Connecticut Act which requires the employer to furnish a competent physician. Commissioner Chandler said: "The notion of competency, when embodied in a legislative act, connotes conformity to some prevailing standard. * * * There are numerous schools and cults enjoying limited patronage and making divers claims of ability to alleviate pain and cure disease, whose merits it is not necessary for me to consider * * * When * * * the employer, operating under this statute undertakes to provide an exponent of any such school or cult as 'competent,' and the question of competency has to be passed upon by the Commissioner, the measure of competency then becomes the prevailing standards of society, not the judgment or convictions of the (employer) however sincerely or disinterestedly exercised.

26. Goldflam v. Kazemier & Uhl, 181 N. Y. App. Div. 140, 168 N. Y. Supp. 87, 18 N. C. C. A. 383, 1 W. C. L. J. 702.
27. Hakala v. Jacobsen-Bade Co., 1 Cal. I. A. C. D. 164.
28. Kelley v. Pacific Electric Ry. Co., 1 Cal. I. A. C. D. 150.
29. Pampuro v. Murray Bros., 1 Conn. C. D. 674.

* * * While it is not without the limits of possibility that some person or group of persons, either by reasoning on theoretical grounds, or by experimentation, or even accident, might discover a new and better method than that generally practiced and taught, such a contingency is highly improbable, and the employer under this Act who provides a practitioner of any such unusual method, contrary to the prevailing standards of society and the preference and consent of the injured employee, fails to conform to the provisions of section 7 of part B of the Act."[30]

In a New York case the court said: "The cause of action pleaded is not one to recover damages for an original injury sustained. It is merely to recover damages for the aggrevation of that injury, because of the failure of the defendant to furnish proper medical aid. This is not a liability that is covered by the compensation act."[31]

There is no authority for the bringing of an independent action by the injured employee in the state courts against an employer who neglects, after due request, to provide such medical attention as is required by the act, since the act provides that claims for services or treatment rendered pursuant to section 13 of the New York Act shall not be enforceable, unless approved by the commission.[32]

§ 491. **When the Employee is Personally Liable for his Medical Treatment.**—The acts of all but three states[33] are construed to give the employer[34] or insurer[35] the right, in the first instance, to choose the medical or surgical attendant. As stated in a re-

30. Reed v. Orient Music Co., 1 Conn. Comp. Dec. 36.

31. Baggs v. Standard Oil Co., of New York, 180 N. Y. Supp. 560, 5 W. C. L. J. 740, (1920).

32. Semmen v. Butterick Pub. Co., 166 N. Y. S. 993, B 1 W. C. L. J.

33. Massachusetts, Rhode Island, and Washington.

34. Keigher v. General Elect. Co., 173 App. Div. 207, 158 N. Y. S. 939; Milwaukee v. Miller, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A 1, Ann. Cas. 1915B, 847.

35. In re Pecott, 223 Mass. 546, 112 N. E. 217; Leadbettor et al. v. Industrial Acc. Comm., 26 Cal. App. 1268, 5 Cal. I. A. C. 233, 177 Pac. 449, 18 N. C. C. A. 382, 179 Cal. 468.

cent Nebraska case: "The employer having been made liable for the services contemplated by the act, it seems from the language used that it must have been the legislative intent that he should be permitted to furnish a physician of his own choice, and if his selection is such as would satisfy a reasonable man under like circumstances the employee would not then be heard to complain. That is the general rule in manufacturing centers, where Employers' Liability Acts with provisions similar to ours were in effect before out act was adopted."[36]

In a Wisconsin case the court said: "The law does not cast upon employers the duty of active vigilance to discover cases of personal injury to their employees, but casts upon the latter such vigilance as they can reasonably exercise to bring such injuries to the attention of employers with their need and desire for medical and surgical treatment to be provided. The result is that Miller, since he failed to notify his employer of his needs, never had competency to employ a physician at the expense of the city of Milwaukee, except for such reasonable length of time as necessarily intervened between his injury and reasonable opportunity after due notice for the city to exercise its privilege. The time could not have been long. How long it is impossible to determine from the record. It is quite certain that Miller voluntarily selected Dr. Bradstad to treat him—not knowing, probably, of the municipality's privilege in the matter. That is his misfortune and, however much it may be regretted, it is far better that the integrity of the law be not invaded than that it be impaired in the slightest degree in the particular instance to avoid the consequence of his not knowing or appreciating its requirements."[37]

36. Radil v. Morris & Co., 103 Neb. 84, 170 N. W. 363, 18 N. C. C. A. 380; Pecott's Case, 223 Mass. 546, 112 N. E. 217; Keigher v. General Electric Co., 173 App. Div. 207, 158 N. Y. Supp. 939; Davidson's Case, 228 Mass. 257, 117 N. E. 310; In re McCaskey, (Ind. App.), 117 N. E. 268, 15 N. C. C. A. 113, note III,, p. 116; City of Milwaukee v. Miller, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A, 1, Ann. Cas. 915 B. 847, 4 N. C. C. A. 149; In re John Miller, 2nd A. R. U. S. C. C. 97; In re Geo. A. Smith, 2nd A. R. U. S. C. C. 219.

37. City of Milwaukee v. Miller, 154 Wis. 652, 144 N. W. 188, 4 N. C. C. A. 149, L R. A. 1916A, 1.

In an Indiana case it was held that, where a servant was injured and taken to a hosptial, and the employer offered on his complaint to take him to another hopital, but the servant refused and went to a different hospital, the employer could not be charged with failure to furnish proper medical care.[38] So where an employee, in the absence of an emergency, called a doctor whose name was not on the list posted by the employer, the employee was held personally liable for the expense.[39] The same ruling was made in a case where the parents of the workman, whom they employed, called their family physician to attend the injured employee, and failed to notify the insurance company, as provided by the act.[40] Such is not the law in cases of emergency aid.[41]

In a Texas case the court said: "It (the act) must be construed as making the liability of the insurer dependent upon the failure to furnish medical aid after reasonable notice of injury."[42]

Where an employee was given in writing the address of the hospital to which he was directed by the employer to go but, being unable to read, write or speak English, he went to the wrong hospital, it was held that the employee was not entitled to an award for his medical and hospital expense.[43]

In a Nebraska case the court said: "The record shows that the physician furnished by the company, and his assistant, who administered first aid, are in all respects competent physicians and surgeons. Was plaintiff's conduct reasonable in the premises? It appears that immediately after the accident, at about 5 o'clock in the evening, plaintiff went with foreman of defendant to the

38. Junk v. Terry & French Co. Inc., 176 N. Y. App. Div. 155, 161 N. Y. Supp. 836; In re John McArdle, 2nd A. R. U. S. C. C. 231.

39. Pecott v. American Mut. etc. Ins., 223 Mass. 546, 112 N. E. 217; Cable Swift & Co. v. Industrial Comm., 288 Ill. 132, 123 N. E. 267.

40. American Indemnity Co. v. Nelson,—Tex. Civ. App.—, 201 S. W. 686, 18 N. C. C. A. 381, 1 W. C. L. J. 1160.

41. Home Life and Acc. Co. v. Cobb,— Tex. Civ. App.—, 220 S. W. 131, 5 W. C. L. J. 916.

42. American Indemnity Co. v. Nelson, (Civ. App.), 201 S. W. 686, 1 W. C. L. J. 1160, 18 N. C. C. A. 381.

43. Cella v. Industrial Acc. Comm., 38 Cal. App. 760, 177 Pac. 490, 18 N. C. C. A. 385.

nearby office of the company physician, where, in his absence, first aid was administered by the assistant in charge, who told plaintiff to return that evening between 7 and 8 o'clock for further treatment by defendant's physician. Plaintiff never returned, and denied that he was requested to do so, notwithstanding both the foreman and the assistant physician testified that the request was made. The next morning at 9 o'clock, on advice of his mother, he went to their family physician, and he from that time retained the case. Plaintiff attempted to justify his employment of a physician by criticizing the first aid treatment that he received, but on this point he called a physician as a witness, and his testimony was corroborative of the treatment so received in all essential particulars. It seems to us that plaintiff's conduct was in effect and within the meaning of the act an unjustifiable refusal to allow defendant to furnish the reasonable services and medicines that the act contemplates, and that defendant is not therefore liable for the medical expenses that he incurred." [44]

It has been held that, where an employee's injuries were aggravated by insufficient attention furnished by the employer, pursuant to an aggreement with the employee to furnish competent medical and surgical attention, the employee's right to recover for such increased expense did not fall within the act, the court quoted with approval from a Kansas case as follows: "So much of an employee's incapacity as is the direct result of unskillful medical treatment does not arise 'out of and in the course of his employment' within the meaning of that phrase as used in the statute. * * * For that part of his injury his remedy is against the persons answerable therefor under the general law of negligence." [45]

The mere fact that an employer furnishes medical aid to an injured employee does not constitute a waiver of his right to subse-

44. Radil v. Morris & Co., 103 Neb. 84, 170 N. W. 363, 18 N. C. C. A. 380.

45. Ellamar Mining Co. of Alaska v. Possus, 247 Fed. 420, 1 W. C. L. J. 723; Ruth v. Witherspoon-Englar Co., 98 Kan. 179, 157 Pac. 403, L. R. A. 1916E 1201; Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 151 Pac. 658.

quently show that the injury did not occur in the employment and that he is not liable for the continuation of the service.[46]

The employer should not be charged with the expense incurred by the surviving dependent of an employee, who called for consultation another physician, in an attempt to save the life of the injured employee when one competent physician was already in attendance.[47]

Under the Indiana Act, as under most acts, final determination of the necessity of surgical and hospital service for injured employees rests with the Industrial Board.[48]

When the employee abandons the medical and hospital service supplied by the employer, and secures other treatment of his own choice, he does so at his own risk, and cannot have the expense of the service of his own choice allowed against the employer or insurer unless he can satisfy the commission that the service supplied by the employer was inadequate or inefficient to an extent that justified the employee in abandoning it.[49]

In a New York case the court said: * * * "irrespective of whether he has recovered from the third party, an employee cannot sue his employer for his medical expenses, although the statute (section 13) requires the employer, after notice, to furnish such services. Semmen v. Butterick Publishing Co., 101 Misc. Rep. 285, 166 N. Y. Supp. 993, approved in Goldflam v. Kazemier & Uhl, Inc., 181 App. Div. 140, 168 N. Y. Supp. 87. Nor can a doctor or attorney who has rendered services to the injured employee sue his employer therefor. Bloom v. Jaffe, 94 Misc. Rep. 222,157 N. Y. Supp. 926; Hirsch v. Zurich General A. & L. Inc. Co., Ltd., 97 Misc. Rep. 360, 161 N. Y. Supp. 380. All these decisions are based on the fact that no such right of action is given

46. Nagy v. Solvay Process Co., 201 Mich. 158, 166 N. W. 1033, 1 W. C L. J. 1049.

47. Mahoney v. Gamble-Desmond Co., 90 Conn. 255, 96 Atl. 1025.

48. In re Henderson, 64 Ind. App., 116 N. E. 315; Rush v. London Lancashire Indemnity Co., 139 Minn. 409, 166 N. W. 772, 1 W. C. L. J. 835.

49. Bride v. Union Iron Works, 1 Cal. I. A. C. D. 326; Van Lanker v. County of Los Angeles, 1 Cal. I. A .C. D. 107; Massachusetts Bonding & Ins. Co. v. Pillsbury et al., 170 Cal. 767, 151 Pac. 419, 11 N. C. C. A. 426; Vaughn v. American Coal Co., 1 Conn. C. D. 617.

by the statute, and that, on the contrary, the statute makes such expenses a part of the compensation provided, and the amount thereof a lien upon the compensation fund."[50]

§ 492. **What Included as Medical and Hospital Service.**—Since the provision in regard to medical benefits varies in the different acts it is necessary to examine the language of the act to determine what may be included under the provision. The following provisions are limited as to time and amount as stated, previously but are typical of compensation acts.

Missouri Section 13 (a) * * * shall receive such medical, surgical and hospital treatment, including nursing, ambulance and medicines as may reasonably be required." * * *

Illinois Section 8 (a) * * * "shall provide the necessary first aid medical and surgical services; all necessary hospital services." * * *

Iowa Section 2477-m9 (b) * * * "shall furnish reasonable surgical, medical and hospital services, and supplies therefor." * * *

Kansas Section 590S * * * "such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches and apparatus as may be reasonably necessary." * * * [51]

Kentucky Section 4 * * * "such medical, surgical and hospital treatment, including nursing, medical and surgical supplies and appliances as may reasonably be required." * * *

Nebraska Section 3661 * * * "shall be liable for reasonable medical and hospital services and medicines." * * *

Oklahoma Art. 2, Section 4. * * * "such medical, surgical or other attendance or treatment, nurse and hospital service."

Tennessee Section 25 * * * "such medical and surgical treatment, medicine, medical and surgical supplies, crutches and apparatus as may reasonably be required."

50. Louis Bossert & Sons v. Piel Bros., 182 N. Y. S. 620, (1920), 6 W. C. L. J. 372.

51. See Cain v. National Zinc Co., 94 Kan. 679, 148 Pac. 25.

The Connecticut Act provides generally for medical, hospital and surgical aid.

In discussing the question of whether an artificial leg was contemplated therein the court said: "The term in its ordinary significance is not limited to the personal service of the surgeon, but includes all the means of instrumentalities used in surgery which will help effect a cure. Splints and crutches and apparatus for holding the limb manifestly are brought to the patient by the surgeon, adjusted by him, and usually paid for directly by the patient. It is part of the duty of the surgeon to prepare the stump of arm or leg for the artificial leg or arm. It is part of his duty to adjust it. Why give the patient splints to hold the bones in place or crutches with which to walk, and regard these as used in surgery? Why supply a glass eye? Because it is the everyday duty of the surgeon to order these things for his patient, and they are included as of course under 'surgical aid.' There is no difference in principle between supplying these and the artificial limb. That pertains to surgery and is used in surgery. The stump must be prepared by the surgeon to receive the artificial limb, and that must be adjusted to the stump by the surgeon. The only difference between the crutch and the artificial limb is the latter costs more than the former. Our act contemplates the furnishing of all the medical and surgical aid that is reasonable and necessary. The purpose of this provision is to restore the injured employee to a place in our industrial life as soon as possible by the use of all medical and surgical aid and hospital service which the ordinary usages of modern science of medicine and surgery furnish. * * * The duty of the surgeon continues until the artificial limb is adjusted and the patient has learned how, with the help of the surgeon, to use it properly. It would not be questioned that the entire bill of the surgeon for his services would fall under the head 'Surgical Aid.' It would be difficult to justify this expenditure, as well as that for bandages or ointments or other material used by the surgeon in his treatment of the patient, and not make a like expenditure for the artificial leg in connection with which these things are used."[52]

52. Olmstead v. Lamphier, 93 Conn. 20, 104 Atl. 488, 18 N. C. C. A. 389, 2 W. C. L. J. 774; In re Allen O. McFarland, 2nd A. R. U. S. C. C. 234.

Section 13 of the New York Act provides as follows: "The employer shall properly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus as may be required or be requested by the employee during sixty days after the injury." The court in holding that an artificial arm was not an "apparatus" within the meaning of said provision said: "That a natural arm is not to be considered as an 'apparatus' must be clear to any one who stops to consider the matter for a moment. * * * It seems clear that the statute in this case does not contemplate anything more than the apparatus necessary or proper for the first 60 days of intelligent and pratical treatment of the injured employee, and that there can be no justification for holding that an artificial arm is an apparatus any more than the natural arm would be an apparatus. An implement would certainly not be defined so as to include an artificial arm, and there is no occasion for construing apparatus in a broader scope; the two words being practically synonymous as generally used. No doubt the claimant could have called for any apparatus which was necessary or proper in the treatment of his health or strength during the 60 days following his injury, and it would have been the duty of the employer to have supplied them, under the conditions prescribed by the statute, but to contend that the claimant could by a mere arbitrary demand impose the duty of supplying a new arm, where he had been fully compensated for the old one, is, we think, wholly without warrant in law."[53]

Damage to false teeth was considered by the California Commission as damage to personal property for the repair of which it had no jurisdiction to make an award.[54] The California Act was

53. Kunasek v. New York Consol. Card Co., 176 N. Y. App. Div. 135, 162 N. Y. Supp. 361, (1916), 15 N. C. C. A. 116; Pedroni v. Blakeslee & Sons, 1 Conn. Comp. Dec. 670.

54. De Witt v. California Highway Comm. et al., 5 Cal. I. A. C. 140.

amended in 1919 Section 9 (a) so as to include under the medical treatment to be furnished by the employer such artificial members as may reasonably be required.

Where nursing service is not specified in the act it is nevertheless construed to be included under the term medical and surgical treatment, "'The services of the nurse for which $32 was allowed were rendered during the first four weeks after the injury. It is noticeable that, notwithstanding Dr. Bradstad visited his patient twice each day for some forty days thereafter, the recovery had so far progressed that services of a nurse were considered unnecessary. The scheme of the legislature included definite specifications of just what burdens an employer shall bear for the benefit of his injured employee. No mention is made in such specifications of services of a nurse during the first ninety days. Therefore, compensation of that sort must be regarded as not within legislative contemplation, except as included in the term 'medical and surgical treatment * * * reasonably required.' It has become so common for a physician or surgeon to have a nurse as his assistant, in cases requiring attention at shorter intervals than he can well be present, that the major service may well be regarded as including the minor attention in all cases where a nurse is employed by the physician or surgeon, or by his direction, and the services are an incident of the treatment; and that would obtain whether the medical or surgical attendant is engaged by the employer or employee. In neither case is there any warrant in the law, as it seems, for allowing compensation for services of a nurse, other than incidental to medical or surgical attention, during the ninety days immediately succeeding the injury." It was also held in this case that gratuitous nursing by members of the injured employee's household could not be charged to the employer as reasonable expense incurred.[55] But where a mother gave

55. City of Milwaukee v. Miller, et al., 154 Wis. 652, 144 N. W. 188, L. R. A. 116A 1, Ann. Cas. 1915B, 847, 4 N. C. C. A. 149; Hughes v. Degen Belting Co., 1 Cal. Ind. Acc. Com. Dec. 203.

up her work to act as nurse for her injured son it was held that an allowance could be made for her services as a nurse.[56]

X-ray photographs have been held to come properly within the medical and surgical benefits provision.[57]

An allowance was made under the New Jersey Act for $100 for a dentist's bill in addition to $100 for hospital and doctors bills.[58]

Plaster casts,[59] truss,[60] and crutches[61] have been held to be proper medical charges, but a charge by the employee for massage in addition to medical treatment was denied.[62] Where the ailments of the applicant indicated a necessity for surgical treatment the California Commission said that it could not hold that the treatment of a Christian Science practitioner may reasonably be required to cure and relieve as those words are used in the compensation act.[63]

Where it is not necessary for the injured employee to go to a hospital he cannot recover the value of his board during his period of incapacity,[64] but where no hospital is available a boarding house keeper furnishing board lodging and nursing should be allowed the reasonable value thereof for the period the injured employee would have otherwise been confined to a hospital.[65]

Where an employee required a surgical operation as a result of an accident, but it was found that his blood was in a condition that required treatment before the operation could be safely per

56. In re Albert J. Abel, 2nd A. R. U. S. C. C. 229; In re Hershel R. Mikkelsen, 2nd A. R. U. S. C. C. 230.

57. Miller v. Aetna Springs Co., 2 Cal. I. A. C. 534; Cole v. Dichman, Id. 702.

58. Earle v. Highstown Symrna Rug Co., 37 N. J. L. J. 11; Day v. Lincoln Sightseeing Co., 1 Cal. I. A. C. (part 2) 269.

59. Gates v. Berlin Const. Co., Conn. Comp. C. Sec. Dist., June 9, 1916.

60. Bulletin No. 2 Mass. Ind. A. Bd. Jan. 113, p. 10.

61. Id.

62. Sorrell v. Sterling Motion Picture Co., 2 Cal. I. A. C. 167.

63. Ash v. Barker, 2 Cal I. A. C. Dec. 577.

64. Hurlowski v. American Brass Co., 1 Conn. C. D. 6.

65. Casler v. Byrne et al., 5 Cal. I. A. C. 224.

formed, it was held that the employee was entitled to total indemnity during the period of treatment for the blood disease.[66]

Where a son gave up employment in which he was earning $3 per day to care for his injured father, his services in that amount were allowed.[67]

An allowance of ten dollars each was made for three consulting physicians called by the physician in charge of the injured employee.[68]

As a general rule all reasonable medical, surgical and hospital and nursing service will be furnished by the employer or insurer without quibbling about the question of whether it is included within the strict letter and limitations of the act, as all such services naturally tend to shorten the period of disability and consequently decrease the amount of compensation which would otherwise be paid on account of the disability.

§ 493. **Deduction of Excess over Statutory Amount of Medical Expense Incurred.**—While the commissions and industrial boards have no authority to make awards for medical services in excess of the amounts limited by the acts,[69] it is generally held that where the employer or insurer voluntarily incurs expense for such services in excess of the statutory amount, such excess cannot be deducted from the amount of compensation to which the injured employee or his dependents may be entitled.

In discussing this question under the Illinois act, by the terms of which medical and hospital services are limited to eight weeks and $200, the court said: "The plaintiff in error expended $744.10 for hosptial services, nurses, medicines, physicians, and

66. Bishop v. National Ice and Cold Storage Co. et al., 5 Cal. I. A. C. 223.

67. Kelley v. Manley, 2 Cal. I. A. C. 355; In re Albert J. Abel, 2nd A. R. U. S. C. C. 229; In re Hershel R. Mikkelsen, 2nd A. R. U. S. C. C. 230.

68. Schlegal v. Frankfort General Ins. Co., 2 Cal. I. A. C. 466.

69. Butler St. Foundry & Iron Co. v. Industrial Board, 277 Ill. 70, 115 N. E. 122, 15 N. C. C. A. 127; State v. District Court, 134 Minn. 16, 158 N. W. 713; McMullen v. Gavette Const. Co., 200 Mich. 203, 166 N. W. 1019, 1 W. C. L. J. 1006.

surgeons in caring for the deceased in the illness resulting from his injuries, and no question is made but that the services rendered were necessary, and the amount fair, reasonable, and customary for the services performed. They were rendered with the knowledge and consent of the deceased and his wife, who is the administratrix, and the plaintiff in error insists that they should be regarded as part of the compensation. It is not claimed however, that there was any agreement that they should be so held. On the contrary, the widow stated that she was never told that the amounts were to be taken out of the compensation. If the plaintiff in error had paid the amount to the widow with the understanding that it was a part of the compensation it would have been entitled to a deduction of it from future payments, even though it was also understood that the money was to be used for hospital, medical and surgical purposes and for nurses, or if it had paid the bills with the understanding that the amount was to be regarded as a part of the compensation it would have been entitled to a like deduction. The employer however is not entitled to a deduction for the payment of such expenses without such agreement. A payment made voluntarily or upon request must be regarded as having been made gratuitously, or in the expectation of saving the life of the employee or reducing his disability, and reducing the total compensation for which the employer would eventually be liable." [70]

§ 494. **Medical Aid after Statutory Period.**—There is some conflict on the question of the employer's liability for medical aid after the time limited in the act. There should of course be no conflict on that point.[71]

The controversy arises over the question of whether the date of the accident is the date of the injury and therefore the time from which the statutory period of limitation shall be reckoned,

70. Crescent Coal Co. v. Industrial Commission of Ill., 286 Ill. 102, 121 N. E. 171, 18 N. C. C. A. 390; Cypher v. United Development Co., 1 Cal. I. A. C. D. 425.

71. Born & Co. v. Durr, 64 Ind. App. —, 116 N. E. 428, 15 N. C. C. A. 123; In re Henderson, 64 Ind. App. —, 116 N. E. 315, 15 N. C. C. A. 124; Home Life and Accident Co. v. Cobb. — Tex. Civ. App. —, 220 S. W. 131, 5 W. C. L. J. 916.

or whether the limitation period shall be reckoned from the date when the result of the accident first or finally culminates in actual disability or a condition requiring medical treatment.

In a Maine case the court held that the commission had no authority under the act to allow compensation for medical services rendered after the statutory period limited in the act, on the theory that the date of the occurrence of disability should be considered the date of the accident where the disability did not develop until after the time limited in the act. The court said: "The plain language of the statute restricts the period to the first 2 weeks 'after the injury,' and, while the act is remedial and to be broadly construed (Simmons' Case, 103 Atl. 68), we find no authority for the substitution for the word used in the statute of another term used in the same statute with a clearly different meaning. If it is desirable to change the period during which medical services shall be furnished, or to extend the powers of the Commission in that regard, legislative action should be had as was done in Massachusetts. See Huxen's Case, 226 Mass. 292, 295, 115 N. E. 426; Coffin v. Rich, 45 Me. 507, 511, 71 Am. Dec. 559; Lizotte v. Nashua Mfg. Co., (N. H.) 100 Atl. 757, 758."[72]

In Michigan it is also held that the date of the accident fixes the date of the injury which is the date from which the statutory period begins to run. So, where a carpenter fell and disability did not culminate until after the medical time limit, in reversing an award for medical services the court said: "The authority for such allowance by the board does not exist except per force of the statute, and the legislative judgment has limited the allowance to such services as are performed during the first three weeks after the injury. Nor has the board authority to award as damages the amount paid for such services performed at a later date, upon the theory * * * that the failure to furnish proper medical and hospital services created a liability

72. In re McKenna, 117 Me. 179, 103 Atl. 69, 18 N. C. C. A. 386, 1 W. C. L. J. 987.

for the payment of such services so performed, which may be awarded by the board as damages."[73]

The Indiana and Massachusetts courts hold that the date of the culmination of the disability or condition requiring medical aid is the date of the injury and the date when the accident occurred. The court in the Indiana case after approving the Massachusetts decisions said: "The langauge of the statute and justice and reason alike, authorize the conclusion that the services of an attending physician for which compensation was intended was a service to be rendered after there was an actual known physical injury, and hence where, as in this case, the undisputed facts show an accident to an employee in the presence of his employer, the immediate effects of which are not such as to indicate to either employer or employee any disability within the meaning of the act in question, or any injury requiring the services of attending physician as provided in said act, and such physician is, at the time, neither asked for nor called by the employee, nor furnished by the employer, and it turns out later that the injury resulting from such accident is more serious than was at first thought, and is in fact such as results in a disability of the employee within the meaning of the statute here involved, the 30 day period during which the employer must, under said section 25, supra of the act, furnish an attending physician begins to run where the disability to the employee within the meaning of the act in question develops from such injury."[74] This rule is also followed by the Connecticut Commission.[75]

73. McMullen v. Gavette Const. Co., 200 Mich. 203, 166 N. W. 1019, 1 W. C. L. J. 1006; Dane v. Michigan United Traction Co., 200 Mich. 612, 166 N. W. 1017, 1 W. C. L. J. 1001.

74. In re McCaskey, 64 Ind. App.—, 117 N. E. 268, 15 N. C. C. A. 113; Hornbrook-Price Co. v. Stewart, (Ind. App.), 118 N. E. 315, 1 W. C. L. J. 582, 17 N. C. C. A. 81; Johnson's Case, 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843, 104 N. E. 735; Hurle's Case, 217 Mass. 223, 104 N. E. 336, 4 N. C. C. A. 527, L. R. A. 1916A. 279, Ann. Cas. 1915C. 919.

75. Barton v. N. Y., N. H. R. R. Co., 1 Conn. C. D. 227.

In another Indiana case where it became evident a few days before the expiration of the thirty-day statutory period that an amputation was an immediate necessity on account of gangrene having developed, the employer could not by mere delay in rendering the necessary emergency service avoid liability therefor.[76]

In a Nebraska case, where a second disability resulted after the period of medical benefits limited by the act had expired the court held that compensation for medical service could not be allowed.[77]

The day of the injury is generally excluded in figuring the statutory period for which the employer must furnish medical treatment.[78]

In those states where the act makes provision for additional medical service upon certain conditions, such as application to the commission, board or court, such conditions must be complied with strictly, otherwise a charge against the employer for such additional service is without authority.[79]

The Massachusetts act provides for extension of medical service "in unusual cases." It was held that where the employee was able to go to the doctor's office for treatment the case was not unusual. In this case the employer wrote a letter to the injured employee advising him that it would allow him one dollar a visit for the attending physician and the doctor having seen the letter and continued treatment was limited in his charge to that amount.[80]

Under the Illinois Act paragraph (a) section 8, the provision for eight weeks medical aid has been construed to mean that the

76. In re Henderson, 64 Ind. App.—, 116 N. E. 315, 15 N. C. C. A. 124.

77. Epsten v. Hancock-Epsten Co., 101 Neb. 442, 163 N. W. 767, 15 N. C. C. A. 1067; Stormont v. Bakersfield Laundry Co., 1 Cal. Ind. Acc. Com. (part 2) 533.

78. Keneavski v. New Haven Carriage Co., 1 Conn. Comp. Dec. 119; Peterson v. Bach & Sons, 1 Conn. Comp. Dec. 469.

79. State ex rel. Anseth v. District Court, 134 Minn. 16, 158 N. W. 713, 15 N. C. C. A. 128.

80. In re Huxen, 226 Mass. 292, 115 N. E. 426, 15 N. C. C. A. 122.

employer must furnish medical aid for any period of eight weeks in which the services are necessary because of injuries received in the employment, not necessarily the eight weeks immediately following the injury. The court said: * * * "The Legislature did not intend that the eight weeks should necessarily be confined to the time immediately following the injury. Nor could such construction be reasonably put upon it, as it frequently occurs, as in this case, that the results of the injury do not develop to such an extent as to require medical, surgical, or hospital services for a considerable period of time after an injury is received, and to hold that such services are to be supplied only within the first eight weeks following the injury would, in many instances, limit such services to but a part of eight weeks, and in other cases prevent recovery for such services altogether."[81]

An employer, by special agreement, may assume the obligation of paying the full value of a physician's charges, irrespective of the limitation in the compensation act, if he so desires, and he is then bound by his agreement.[82]

Where the employer directed a physician to take an employee to a hospital "give him close attention, and do what you can for him" it was held that that was sufficient to warrant an inference that the physician was authorized to continue treatment beyond the 30-day limit in view of the serious nature of the injury which was known at the time.[83]

Where the Indiana Act provides that an employer may furnish the attending physician free of charge to the employee after the time specified in the statute, and the employer furnishes medical attendance beyond that time, the physician's services were included in the benefits provided by the law and an insurance company, under a policy providing for the payment of all bene

81. Chicago Sandoval Coal Co. v. Indus. Comm., — Ill. —, (1920), 128 N. E. 567.

82. Collins v. Joyce, — Minn. —, (1920), 178 N. W. 503, 6 W. C. L. J. 463.

83. In re Meyers, — Ind. App. —, 116 N E. 314, A 1 W. C. L. J. 493.

fits provided by the statute for physician's fees, etc., was liable for the additional attention beyond the statutory limit.[84]

It was held in a Massachusetts case, that, where the statute provides that a physician's charges shall be subject to the approval of the Industrial Board, it has reference only to the amount for which the insurer is liable, and that a physician may collect any amount for which the employee is personally liable even though the bill is not approved by the board.[85]

§ 495. **Medical Treatment Causing Disability.**—Where the employee administered home treatment because of the negligence of the employer in failing to furnish medical attention and infection followed, aggravating the disability, the employer was held liable for the medical expenses consequent upon such aggravation.[86]

Where a proposed operation for cataract on the eye of an employee, nearly two years after the injury would not be attended with any risk and appeared to be such as a reasonable man would take advantage of, it is the duty of such employee to have such operation performed, and, upon his unreasonable refusal, the continued total loss of sight should be attributed to such refusal and not to the accident.[87]

Where an employee, who was a foreigner, misunderstood the instructions of the attending physician and the injury developed into a more serious condition than it otherwise would have, the court held that the claimant was not guilty of any wilful or intentional misconduct, and compensation was allowed for the aggravated condition.[88]

84. In re Kelley, — Ind. App. —, 116 N. E. 306, A. 1 W. C. L. J. 487; Kirkoff Bros. & McElaine v. McCool, — Ind. App. —. 116 N. E. 439.

85. Holland v. Zeuner, — Mass. —, 117 N. E. 1, A 1 W. C. L. J. 783.

86. Forgues v. Southern Pacific Co., 2 Cal. I. A. C. 964; Also where treatment is furnished under like circumstances by an unlicensed physician. Stockwell v. Waymire, 1 Cal. I. A. C. Part 2, 225.

87. Joliet Motor Co. v. Industrial Bd. of Ill., 280 Ill. 148, 117 N. E. 423; 15 N. C. C. A. 75, 1 W. C. L. J. 30; Kricinovich v. American Car Co., 192 Mich. 687, 159 N. W. 362, 15 N. C. C. A. 79; Lesh v. Ill. Steel Co., 163 Wis. 124, 157 N. W. 539, 15 N. C. C. A. 80.

88. Oniji v. Studebaker Corp., 196 Mich. 397, 163 N. W. 23, 15 N. C. C. A. 76; Poniatowski v. Stickley Bros. Co., 194 Mich. 294, 160 N. W. 569, 15 N. C. C. A. 77.

An employee suffered the loss of one eye as the result of some foreign substance lodging in it. Defendant denied liability on grounds of the negligent conduct of the claimant in placing a potato poultice on his eye. As to the latter allegation the evidence was conflicting. The court held that the evidence was sufficient to support the conclusion of the board that the loss of the claimant's eye was due to wilful or unreasonable misconduct with reference to caring for the eye.[89]

When a physician, furnished by the employer or insurance carrier, makes a wrong diagnosis, the extended disability, resulting therefrom is compensable.[90]

Where an employee sustained injuries in the course of his employment and afterwards, due to the malpractice of the attending surgeon disability resulted, compensation was denied because the disability was due to the malpractice and not to the injury arising out of the employment.[91]

Where a surgeon of an injured employee's own selection makes a wrong diagnosis, the employer is not relieved from the results of such mistake even though opportunity had not been given to furnish the medical treatment.[92]

Where a patient was subjected to a painful and unnecessary operation through the physician's mistake, and by reason of such operation the period of the employee's disability was greatly prolonged, and aside from this factor no cause appeared why the employee should be allowed compensation for his injury, it was held that the employee was not entitled to compensation, even though the insurance company acquiesced in and sanctioned such treat-

89. Riley v. Mason Motor Co., 199 Mich. 233, 165 N. W. 745, 1 W. C. L. J. 406, 15 N. C. C. A. 78; Aylward v. Oceanic Steamship Co., 2 Cal. Ind. A. C. D. 95, 10 N. C. C. A. 186.

90. Johnson v. Pacific Surety Co., 1 Cal. I. A. C. Part 2, 560; Allard v. Browne, 2 Cal. I. A. C. 489, 11 N. C. C. A. 761.

91. Rocca v. Stanley Jones and Co., (1914), 7 B. W. C. C. 101, 11 N. C. C. A. 759; Humber Towing Co. v. Barclay, 5 B. W. C. C. 142; 11 N. C. C. A. 758.

92. Mitchell v. Occidental Forwarding Co., 2 Cal. I. A. C. 336, 11 N. C. C. A. 761.

ment.[93] This decision is contrary to the weight of authority and is apparently in direct conflict with the other decisions of the California commission on this point.

Where an employee suffered a dislocation of the shoulder and was discharged in two weeks by the physician as cured, and at once sustained another dislocation of the same shoulder while bathing, the commission held that he was entitled to compensation for the disability arising out of the second physical lapse, because it was directly caused by and was an incident of the previous injury.[94]

Where an employer neglected to furnish medical attention, after notice of injury, and the employee, uncertain what to do, changed physicians, and through neglect, infection resulted, requiring amputation of the arm at the elbow instead of amputation of the fingers, the employer was liable for the loss of the arm as well as the medical expenses.[95]

Under the Wisconsin Act the employer is liable for any aggravation of the injury caused by the negligence of the physician treating the employee, for a period of ninety days after the accident. As to liability for a greater length of time the court did not decide.[96]

It was held in a Washington case that an injured employee had no right of action for an injury caused by malpractise of the attending physician because the resultant injury or aggravation is not an independent injury. It is proximate to the original injury and measured as such. When a workman is hurt and removed to a hospital, or is put under the care of a surgeon, he is still, within every intendment of the law, in the course of his employment and a charge upon industry, and so continues as long as his disability continues.[97]

93. Spangler v. Philbin, 2 Cal. I. A. C. 158, 11 N. C. C. A. 761.

94. Kordellos v. N. W. Pac. Ry. Co., 1 Cal. Ind. A. C. 586, 11 N. C. C. A. 762; Douglas v. J. & J. Drug Co., 2 Cal. I. A. C. 164, 11 N. C. C. A. 761.

95. Sams v. Komas & Dorros, 2 Cal. Ind. A. C. 203.

96. Pawlak v. Hayes, 162 Wis. 503, 156 N. W. 464, 11 N. C. C. A. 752.

97. Ross v. Erickson Const. Co., 89 Wash. 634, 155 Pac. 153, 11 N. C. C. A. 757.

Where the chain of causation is not broken by a *novus actus interveniens*, it is not material that the immediate cause of injury or death is due to the mistake or negligence of attending physicians, where they act honestly.[98]

In Kansas the opposite view is taken, the court saying: "A part of the loss occasioned by an accidental injury to a workman is cast upon the employer, not as reparation for wrongdoing, but on the theory that it should be treated as a part of the ordinary expense of operation. So much of an employee's incapacity as is the direct result of unskillful medical treatment does not arise 'out of and in the course of his employment' within the meaning of that phrase as used in the statute. Laws 1911, c. 218 Par. 1. For that part of his injury his remedy is against the persons answerable therefor under the general law of negligence, whether or not his employer be of the number."[99]

"Under the Oklahoma Workmen's Compensation Act, it is incumbent upon the employer to promptly provide medical and surgical aid, and where it was conclusively found by the commission that the workman's injuries had been aggravated and his disability increased by improper treatment of the physicians so provided without fault of the workman himself, it was held that the employer was liable for all legitimate consequenses following the accident, including unskillfulness or error of judgment of the physician furnished as required, and that the employee was entitled to recover under the schedule of compensation for the extent of his disability based upon the ultimate result of the accident regardless of the fact that the same had been aggravated and increased by the intervening negligence or carelessness of the employer's selected physician."[1]

98. In re Burns, 218 Mass. 8, 105 N. E. 610, Ann. Cas. 1916 A, 787; Pelletier v. Lachance, 47 Que. Super. 526; Newcomb v. Albertson, 85 N. J. L. 435, 89 Atl. 928, Beadle v. Milton, 114 L. T. 550, 5 W. C. C. 55; Smith v. Cord Taton Colliery Co., 2 W. C. C. 121.

99. Ruth v. Witherspon Englar Co., 98 Kan. 179, 157 Pa. 403, L. R. A. 1916 E 1201.

1. Booth & Flinn v. Cook, — Okla. —, (1920), 193 Pac. 36, 7 W. C. L. J. 144.

A workman fell and injured his knee, and after several weeks treatment with no improvement, an X-ray was taken that showed a broken bone, and proper medical treatment was administered. The contention of the employer that the incapacity was due to improper medical treatment was overruled.[2]

Where an employee is taken to a hospital over his objection by fellow employees, and the employer did not authorize this action, the employer was not liable for the negligent treatment by a physician in the public hospital. This was ground for a suit for damages at common law.[3]

An employee, who failed to follow the direction of a physician, and thereby caused his disability to be prolonged, was allowed compensation for such time as it was estimated the workman would have been incapacitated if he had followed such directions.[4]

Where a physician uses a hypodermic needle in the treatment of an injury and infection results from the use of the needle, causing blood poisoning, the injury is due to the accident.[5]

A surgeon sought to save a badly crushed hand by thoroughly cleansing the wound, an experiment which was very painful, necessitating the administering of an anaesthetic. This experiment was apparently successful; but a second operation was deemed necessary to prevent a contraction of the hand. This second operation was not dangerous but was painful, and a second anaesthetic was administered and the man died under it. It was held that the death was due to the original injury, and compensation was awarded.[6]

2. Harrison v. Ford, English Ct. of Appeal 8 B. W. C. C. 429; Schofield v. Contractors Mutual Liability Ins. Co., 1 Mass. Ind. Acc. Bd. 95.

3. Allegar v. American Foundry Co., 206 Fed. 437, 124 C. C. A. 319.

4. Reiner v. Morris Plains State Hospital, 37 N. J. L. J. 179.

5. Barley v. Interstate Cas. Co., 8 App. Div. 127, 40 Supp. 513, Aff'd. 158 N. Y., 723, 53 N. E. 1123; Marchi v. Aetna Life Ins. Co. 205 N. Y. 606, 98 N. E. 1108.

6. Shirt v. Calico Printers Assn., 100 L. T. 740; 2 B. W. C. C. 342.

Where an injury to an employee necessitated an operation and pneumonia followed, causing death, the death was held to be due to a personal injury.[7]

Where an employee refused medical treatment offered by his employer, and engaged a physician of his own choosing, and then sought compensation for the negligence of the physician resulting in lung trouble, the court said "that an industry is liable for all legitimate consequences following from an accident, among which is the possibility of an error of judgment or unskillfulness on the part of any attending physician whether called in by the employer or the employee."[8]

An employee is not necessarily deprived of all compensation for his refusal to accept medical services from his employer, but only for an injury or increase of incapacity caused by the refusal of the medical services tendered or the malpractice of the physician of his own choosing.[9]

The court in holding that the employer was not liable under the Minnesota Act for disability caused by malpractice said: "It by no means follows that one whose negligence causes the original injury is liable for the negligence of the physician employed to treat it, and it is clearly not true that the physician is not liable to the patient for such negligence. When it appears as it clearly does here, that there is a liability on the part of the physician to the patient, it is a strain to hold that a settlement between the injured man and the wrongdoer for the injury by the accident whether made under the compensation act or outside of it, includes the claim that the injured man has against his physician for separate and subsequent injury."[10]

7. Raymond v. U. S. Casualty Co., 1 Mass. Ind. A. Bd. 277.

8. Salvatore v. New England Casualty Co., 2 Cal. Ind. A. C. 355, 1[illegible] N. C. C. A. 760; McNamara v. U. S. Fidelity & Guarantee Co., 1 Cal. Ind. A. C. 138.

9. Neary v. Philadelphia & Reading Coal & Iron Co., — Pa. —, (1919), 197 Atl. 696, 4 W. C. L. J. 642.

10. Viito v. Dolan, 132 Minn. 128, 155 N. W. 1077, 13 N. C. C. A. 628. See Section 496. Refusal, neglect or failure of medical treatment.

Disability resulting from the application of pure lysol to a nondisabling injury, upon the advise of a friend, is not compensable under the Federal Act.[11]

§ 496. **Refusal, Neglect or Failure of Medical Treatment.**— The following subsection of the Missouri act Section 13(d) sets out substantially the rule of law on this subject as evolved by the decisions in those states where a similar section is not contained in the act. "No compensation shall be payable for the death or disability of an employee, if and in so far as the same may be caused, continued or aggravated by an unreasonable refusal to submit to any medical or surgical treatment or operation, the risk of which is, in the opinion of the commission, inconsiderable in view of the seriousness of the injury. If the employee dies as a result of an operation made necessary by the injury, such death shall be deemed to be caused by the injury." The question whether the refusal to submit to medical treatment or surgical operation is unreasonable depends upon the facts of each case.[12]

In a Michigan case in which the employer refused to continue to pay compensation to an injured employee and a physician testified that while there was no assurance that an operation would effect a cure, it would be the only remedy, and in a large majority of cases a cure was effected through an operation, the court said: "Before the defendant is to be charged, in law or morals, with the duty to compensate him, the claimant shall first discharge the primary duty owing to himself and society to make use of every available and reasonable means to make himself whole. This, in our opinion, he has not done, and the defendant seems to have discharged the burden of proving that the claim-

11. In re Edward Kuehn, 2nd A. R. U. S. C. C. 121.

12. Ruabon Coal Co. v. Thomas, (1909), 3 B. W. C. C. 32; Hay's Wharf v. Brown, (1909), 3 B. W. C. C. 84; Burgess & Co. v. Jewell, (1911), 4 B. W. C. C. 145; Shirt v. Calico Printers' Ass'n, (1909), 2 K. B. 51, 3 B. R. C. 62, 78 L. J. K. B. N. S. 528, 100 L. T. N. S. 740, 25 Times L. R. 451, 53 Sol. Jo. 430; Dolan v. Ward, (1915), W. C. & Ins. Rep. 274, 8 B. W. C. C. 514.

ant's refusal to submit to the operation to relieve him is unreasonable."[13]

Where an employee was in a foreign country when he received a request by mail from the employer to submit himself to a medical examination to which he replied at once and four months later returned to the United States, the court held that the finding of the board that the employee "did not refuse the examination" and did not obstruct the same was warranted by the evidence.[14]

Where a meat hook which an employee was using slipped and penetrated the skin at the base of his thumb, but the employee did not consider it serious and continued his work until the afternoon of the next day when he went to the defendant's doctor, who dressed it and ordered the employee to come back next day, which he failed to do because his hand was paining him so that he did not leave his bed, in holding that the plaintiff was not guilty of such negligence as would bar compensation the court said: "There is no dispute as to what occurred. He went promptly enough to the defendant's doctor, who gave him all the treatment deemed necessary; when he found himself unable to leave his bed the following day, he certainly used reasonable efforts to procure the attendance of Dr. Lewis, and, failing in that, immediately called in a competent physician. When he failed to get relief, he discharged that physician and called another. 'It would be a strange doctrine to hold that this man, unable to speak our language, is to be held guilty of negligence because doctors called as expert witnesses failed to agree as to what was the proper medical treatment for his injury. The mere fact that Dr. Lewis found him in bed several days after the injury with no dressing or bandage upon his hand and arm does not tend to show that the plaintiff was negligent in procuring proper medical attention. Three physicians had failed to bring

13. Kricinovich v. American Car & Foundry Co., 192 Mich. 687, 159 N. W. 362, 15 N. C. C. A. 80; In re Asher Walker, 3rd A. R. U. S. C. C. 153; Strong v. Sonken-Galamba Iron and Metal Co., — Kan. —, (1921), 198 Pac. 182.

14. In re McLean, 223 Mass. 342, 111 N. E. 783, 15 N. C. C. A. 83.

him relief, and it is not strange that in his suffering he was found with no bandages or dressing upon his arm."[15]

In an Indiana case an employee sustained a "twist and laceration of the index finger," and the attending physician advised an amputation, to which the employee objected, and the physician stated that he had saved fingers as badly injured as that, so it was agreed that they would try to save it, but it later became necessary to amputate it to save the hand. The court succinctly stated the general rule of law governing such cases as follows: "The law seems to be well settled that an injured employee seeking compensation must submit to an operation which will cure him when so advised by his attending physician, when not attended with danger to life or health or extraordinary suffering and, if as a result of such refusal on his part he suffers a permanent impairment, the employer will not be required to compensate him, for the resulting permanent impairment."[16]

Where the uncontradicted evidence shows an X-ray examination and photographs are unnecessary the employee cannot be denied compensation for refusal to comply with a request to submit to such examination and have photographs taken.[17]

Where an employee suffered an injury to his eye but continued to work for about fifteen months, when he became so blind that he could distinguish only light, and the evidence showed that he was suffering from a cataract, which in about seventy-five percent of the cases could be removed so as to restore vision, the court held that the Industrial Board was without authority to make an award for loss of sight upon the employee's refusal to undergo the operation for the removal of the cataract.[18]

15. Dobish v. Cudahy Packing Co., 101 Kan. 764, 171 Pac. 915, 18 N. C. C. A. 666, 2 W. C. L. J. 63.

16. Enterprise Fence & Foundry Co. v. Majors, — Ind. App. —, 121 N. E. 6, 18 N. C. C. A. 669; Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 Pac. 24.

17. United States Fidelity & Guaranty Co. et al. v. Wickline, 103 Neb. 21, 170 N. W. 193, 18 N. C. C. A. 664.

18. Joliet Motor Co. v. Industrial Bd. of Ill. 280 Ill., 148, 117 N. E. 423, 15 N. C. C. A. 75.

If a workman is not to be subjected to unusual risks and danger arising from the anesthetic to be employed, or from the nature of the proposed operation, it is his duty to submit to it if it fairly and reasonably appears that the result of such operation will be a real and substantial physical gain.[19]

But where it appears that a risk of life is involved, although such risk is slight, a refusal to submit to an operation is not unreasonable. This rule was followed in a New Jersey case in which the evidence showed that the risk of loss of life was about 43 chances in 23,000. The court said: "Nevertheless the idea is appalling to one's conscience that a human being should be compelled to take a risk of death, however slight that may be, in order that the pecuniary obligation created by the law in his favor against his employer may be minimized."[20]

Where the claimant was operated on in August, 1913, and subsequent thereto, a nodule developed near the scar, involving a superficial nerve, and the claimant refused to undergo a further slight operation for the removal of this nodule, the court held that claimant was not entitled to further compensation because his disability was due to his willful refusal to undergo a minor and safe operation. The court said: "Where the applicant under the Workmen's Compensation Act unreasonably refuses to undergo a safe and simple surgical operation which is fairly certain to result in a removal of the disability, and is not attended with serious risk or pain, and is such as an ordinarily prudent and courageous person would submit to for his own benefit and comfort, no question of compensation being involved, the disability which the claimant suffers thereafter, a reasonable time being allowed for recovery, is not proximately caused by the accident, but is the direct result of such unreasonable refusal."[21]

19. Floccher v. Fidelity & Deposit Co., 221 Mass. 54, 108 N. E. 1032.

20. McNally v. Hudson & M. R. Co., 95 Atl. 122, 87 N. J. L. J. 455, 10 N. C. C. A. 185; Hendley v. Okla. Union Ry. Co., — Okla. —, (1921), 197 Pac. 488; Western Indem. Co. v. Milam, — Tex. Civ. App. —, (1921), 230 S. W. 827.

21. Lesh v. Ill. Steel Co., 163 Wis. 124, 157 N. W. 539, 15 N. C. C. 1259

An employee is not compelled to undergo an operation, in order that he may not forfeit his right to compensation, when the outcome of the operation is problematical, uncertain and attended with danger.[22]

Where a workman refuses to undergo an operation, which although attended with risk, would probably be successful, the incapacity may still be considered the result of the injury.[23]

Where an employee was suffering from an inguinal hernia as the result of an accidental injury, the court held, that, in view of the fact that hernia may be successfully cured in the great majority of cases by submitting to an operation, which is attended with little if any danger, it is unreasonable of the employee to refuse an operation, and compensation will be denied, if he persists in his refusal.[24]

After an industrial accident board determines that an operation is advisable and the injured employee refuses to accept it, payment of disability compensation terminates during the period of such refusal upon the ground that the disability of the em-

A. 80, L. R. A. 1916E. 105; Joseph-Dolan & Son v. Ward, 1915 W. C. & Ins. Rep. 274, 10 N. C. C. A. 188; Mt. Olive Coal Co. v. Indus. Comm., — Ill. —, (1920), 129 N. E. 103, 7 W. C. L. J. 272; O. W. Rosenthal & Co. v. Indus. Comm., — Ill. —, (1920), 129 N. E. 176, 7 W. C. L. J. 286.

22. Marshall v. Ransome Concrete Co., 33 Cal. App. 782, 166 Pac. 846, 15 N. C. C. A. 81; Bruce v. Taylor & Maliskey, 192 Mich. 34, 158 N. W. 153, 14 N. C. C. A. 145.

23. Rothwell v. Davies, (1903), 5 W. C. C. 141.

24. Clay v. Standard Oil Co., Cal. I. A. Comm., 1 Nat. Comp. Journal; O'Brien v. Albert A. Albrecht Co., — Mich. —, 172 N. W. 601, 4 W. C. L. J. 234; 6 A. L. R. 1257; Scerbowicz v. City of New Britain, 1 Conn. C. D. 671; McNamara v. U. S. Fidelity & Guar. Co., 1 Cal. I. A. C. D. No. 9 (1914) 1, 6 N. C. C. A. 404; Aquilano v. Lambo, 1 Conn. C. Dec. 145; Boggeln v. Coronado Hotel, 1 Cal. I. A. C. D. No. 18, (1914), 6 N. C. C. A. 404; Taylor v. Spreckles, 2 Cal. I. A. C. D. (1915) 62, 10 N. C. C. A. 198; McNally v Hudson & M. R. Co., 87 N. J. L. 455, 95 Atl. 122, 10 N. C. C. A. 185; Yukanovitch v. Mass. Employer's Ins. Ass'n., 2 Mass. Wkm. C. C. (1914) 787, 10 N. C. C. A. 188; Schiller v. Baltimore & Ohio R. Co., —, Md. App. —, (1920), 112 Atl. 272; Mt. Olive Coal Co. v. Indus. Comm., — Ill. —, (1920), 129 N. E. 103, 7 W. C. L. J. 272.

ployee was aggravated by his unreasonable refusal to submit to proper surgical treatment.[25]

A foreigner lost the sight of one eye as the result of an injury. Physicians advised that he submit to an operation to prevent the other eye from becoming sympathetically infected, ending in loss of vision and total blindness. The offer was refused unless the operation could be performed in Italy. The conduct of the employee was held to be unreasonable, and upon total loss of sight, compensation for the loss of the second eye was refused.[26]

An employee, a native of Turkey objected and refused to undergo an operation because he would be distressed at the appearance of his hand with the finger removed, as would also his family and countrymen upon his return home. The operation incurred no extreme risk of any kind and would result in a speedy recovery. This was held to be an unreasonable refusal.[27]

The English cases are unanimous in holding that an unreasonable refusal upon the part of the injured employee to submit to an operation attended with no grave dangers and which would, in every probability, result in a recovery, is ground for terminating disability payments.[28]

25. Aylward v. Oceanic Steamship Co., 2 Cal. Ind. A. C. D. (1915) 95, 10 N. C. C. A. 186; Gordon v. Evans, 1 Cal. Ind. Acc. Com. D. (No. 14, 1914) 12, 6 N. C. C. A. 681; Haley v. Hardenberg Mining Co., 1 Cal. I. A. C. D. (No. 8, 1914) 6 N. C. C. A. 682; Cochran v. Whiting Wreck Co., 1 Cal. I. A. C. D. (No. 12, 1914) 1, 6 N. C. C. A. 675.

26. Nicotero v. Globe Indemnity Co., 2 Mass. Wkm. Comp. Cas., (1914), 531, 10 N. C. C. A. 187.

27. Ollie v. Travelers Ins. Co., 2 Mass. Wkm. Comp. Cas., (1914), 676, 10 N. C. C. A. 187; Barry v. Charles F. Kane and Co., 1 Cal. I. A. C. D., (1914), 629, 10 N. C. C. A. 188; Slater v. N. Britain Trap Rock Co., 1 Conn. C. Dec. 501.

28. Walsh v. Locke & Co., (Eng. Ct. of App.), (1914), W. C. & Ins. R. 98, 6 N. C. C. A. 675; Warncken v. Moreland & Son Ltd., (1909), 1 K. B. 184, 78 L. J. K. B. 332, 100 L. T. 12, 25 T. L. R. 129, 58 Sol. J. 134, 2 B. W. C. C. 350, 6 N. C. C. A. 677; Tutton v. S. S. Majestic (Owners of), (1909), 2 K. B. 54, 78 L. J. K. B. 530, 100 L. T. 644, 25 T. L. R. 482, 53 Sol. J. 447, 2 B. W. C. C. 346, 6 N. C. C. A. 676; Marshall v. Orient Steam Nav. Co., Ltd., (1910), 1 K. B. 79, 79, L. J. K. B. 204, 101 L. T. 584, 26 T. L. R. 70, 54 Sol.

An employee who refuses to undergo an operation, which his own doctor advises, and which is not accompanied by any risk, but the beneficial effects of which he will not guarantee, is not acting unreasonable.[29]

Where doctors disagree as to the probable success of the operation, the trend of the decisions is that a refusal to submit to the operation is not unreasonable.[30]

An employee, a foreigner, who was injured by a blow on the stomach, resulting, according to the diagnosis of the attending physician, in a punctured intestine, refused to submit to an operation, which was attended with very little risk. About 14 hours later he submitted to the operation and died two days later of pneumonia. It was held that the employee was not guilty of such intentional and wilful misconduct as would defeat his widow's claim for compensation, because it was not shown that an earlier operation would have saved his life.[31]

It was held in the same case that it is error for the trial court to make an award for temporary disability upon the theory that

J. 64, 3 B. W. C. C. 15, 6 N. C. C. A. 677; Paddington Borough Council v. Stack, 2 B. W. C. C. 402, (1909), 6 N. C. C. A. 678: Gilbert v. Fairweather, 1 B. W. C. C. 349, (1908), 6 N. C. C. A. 678; Ruabon Coal Co. v. Thomas, 3 B. W. C. C. 32 C. A.; Anderson v. Baird & Co. Ltd., 5 F. 373, 40 Sc. L. R. 263, 1903, 6 N. C. C. A. 678; Donelly v. Baird & Co. Ltd., (1908), S. C. 536, 45 Sc. L. R. 394, 1 B. W. C. C. 95, 6 N. C. C. A. 678; Wheeler Redley Co. v. Dawson, (1912), 5 B. W. C. C. 645 C. A.; O'Neil & Co. v. Brown Ltd., (1913), 6 B .W. C. C. 428, Ct. of Sess.

29. Hawkes v. Richard Coles & Sons, 3 B. W. C. C. 163, 1910, 6 N. C. C. A. 678.

30. Ruabon Coal Co. v. Thomas, 3 B. W. C. C. 32, (1909), 6 N. C. C. A. 682; Molamphy v. Sheridan, (1914), W. C. & Ins. Rep. 20, 6 N. C. C. A. 682; Rothwell v. Davies, 198 T. L. R. 423, 5 W. C. C. 141, (1903), 6 N. C. C. A. 683; Sweeney v. Pumpheraton Oil Co., Ltd., 5 F. 972, 40 Sc. L. R. 721, (1903), 6 N. C. C. A. 683: Moss & Co., v. Akers, 4 B. W. C. C. 294, (1911), 6 N. C. C. A. 683; Braithwaite & Kirk v. Cox, (1912), 5 B. W. C. C. 77 C. A.; Mercurio v. Cal. Transp. Co., 1 Cal. I. A. C. D. (No. 15, 1914) 11, 6 N. C. C. A. 683.

31. Jendrus v. Detroit Steel Products Co., 178 Mich. 265, 144 N. W. 563, 4 N. C. C. A. 864, L. R. A 1916A 381, Ann. Cas. 1915R 476.

the injury may be cured by an operation, and that it is the duty of the employee to undergo such operation.[32]

Where an accident board finds that the employee's condition of disability is due to the original injury, and not to a refusal to submit to an operation, that finding, if supported by any evidence, is final.[33]

A dependent cannot be denied compensation for refusing to submit to an operation of doubtful results, and attended with risk of life, for the purpose of removing the disability causing dependency.[34]

A workman received an injury to his arm and amputation was advised, but the arm was saved, though there was a poor recovery, the patient being left unfit for work, and evidence was produced showing that unless the patient submitted to an operation this condition would continue, it was claimed that the award could not exceed that authorized for the loss of an arm. This contention was denied because total permanent disability may exist without the loss of or injury to any specific member. Even though the patient might be restored to a condition that should permit him to go back to work, still he is not required to undergo a serious operation, such as the amputation of the arm at the shoulder.[35]

Where an employee violates rules of the commission or disobeys the orders of an attending physician or otherwise arbitrarily refuses to co-operate with those in attendance upon him, the award should cover only such a period of disability as would usually and ordinarily results from the character of the injury suffered by the employee.[36]

32. Feldman v. Braunstein, 87 N. J. L. J. 20, 93 Atl. 679, 11 N. C. C. A. 430; Gordon v. Evans, 1 Cal. Ind. Acc. Comm. D. (No. 14, 1914), 12, 6 N. C. C. A. 681.

33. Smith v. Battjes Fuel & Bldg. Co., 204 Mich. 9, 169 N. W. 943, 3 W. C. L. J. 333.

34. Mahoney v. Gamble-Desmond Co., 90 Conn. 255, 96 Atl. 1025, 13 N. C. C. A. 315.

35. Simpson v. N. J. Stone & Tile Co., 93 N. J. L. 250, 107 Atl. 36, 4 W. C. L. J. 425.

36. Varoukas v. Indus. Comm., — Utah —, (1920), 191 Pac. 1091,

Where the evidence discloses that the doctor and the claimant did not understand each other as to when the latter was to come back for treatment it cannot be said that he refused treatment.[37]

Where the employer voluntarily paid compensation during the period that the employee refused medical treatment, he waived his right to refuse compensation while such refusal continued, and he cannot refuse thereafter to pay compensation for permanent partial disability because of the past refusal to accept the physician's services.[38]

§ 497. **Charge and Recovery by Physician.**—When the compensation act is silent on the matter of the charge of physicians and surgeons for their services, the general rule in so far as one may be said to exist all, is as set out in the Missouri Act, Section 13 (c) "All fees and charges under this section shall be fair and reasonable, shall be subject to regulation by the commission, and shall be limited to such as are fair and reasonable for similar treatment of injured persons of a like standard of living. The commission shall also have jurisdiction to hear and determine all disputes as to such charges."

Because of the small amount involved, there are few appellate court decisions on this subject. As to the matter of recovery by the attending physician for his services, it would appear that as a matter of precaution he should notify the employer of his patient of his charges for the medical services, being rendered while they are being rendered or at least before the full compensation settlement for disability has been made or paid.

Since, however, most acts make the employer or his insurance carrier liable for reasonable medical expense it would appear that the physician should be permitted to recover in a direct action at common law against the employer or insurance carrier,

6 W. C. L. J. 599; In re Wm. Holaway, 2nd A. R. U. S. C. C. 225; In re Wm. J. Murray, 2nd A. R. U. S. C. C. 226.

37. Poniatowski v. Stickley Bros. Co., (Mich.), 160 N. W. 569, A 1 W. C. L. J. 1000.

38. American Coal Mining Co. v. Decourcey, — Ind. App. —, (1921), 129 N. E. 635.

if there is no express contract between them, on the theory that the acceptance of the act by the employer and employee constitutes a contract for the benefit of a third person, the physician, upon which contract the physician should be permitted to sue for the services rendered.[39] Again, since the commission is as a rule given jurisdiction to hear and determine all disputes as to such charges, it would seem that it has the right to make an award for such services in addition to the award to the employee for his disability compensation or benefits. It is unfortunate that most of the acts have failed to include specific provisions on this point. The appellate court decisions that refer to recovery by the physicians are few.

Where a hospital elected to bring an action against an employer for medical services furnished an employee and based its cause of action on an express contract rather than the liability under the statute, the express contract must be proved in order to recover.[40]

Under the California act if notice of lien has been filed by the physician entitled to fees for attendance on an injured employee such fees should be paid to the physician direct, but if no such notice has been filed, then the medical fees as determined should be paid to the injured employee.[41]

An award which directs that a physician's fee be paid directly is invalid, when it does not fix the amount of the fee, or name the person entitled thereto, or show that the required written notice of claim was given.[42]

It was held in a Texas case, that a physician may recover direct from an insurer, where treatment given was surgical in nature and the treatment given, after the two weeks period, was only incidental in value. In emergency cases the employee may call in

39. Huddleston et al. v. Texas Pipe Line Co., — Tex. Civ. App. —, 230 S. W. 250.

40. Homepathic Hospital v. Chalmers, 94 Misc. 600, 157 N. Y. Supp. 1000.

41. Ducy v. American Mutual Liability Ins. Co., 2 Mass. Ind. Acc. Bd. 513.

42. Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319. 153 Pac. 24.

any physician at the expense of the association. The reasonable value of the services of an assistant may also be included.[43]

But no action will lie against an employer to recover for medical treatment rendered to an employee by a physician who had not been requested to furnish such treatment to the knowledge of the employer, especially so where the employer has not refused to furnish treatment; and where the facts presented justifies the bringing of a suit of this character, it must be instituted within the time specified in the act.[44]

Under the New York Act, where the commission merely approves the physician's bill for treatment of the injured employee, the physician cannot maintain a suit directly against the insurance carrier for the amount, since it did not appear that there was any discretion given by the commission respecting the manner of payment, and also enforcement of payment could be made only by an action instituted by the commission.[45]

Charges of a chiropractor cannot be recovered in the absence of an order for such treatment by a licensed physician.[46]

In a New York case the court said: * * * "irrespective of whether he has recovered from the third party, an employee cannot sue his employer for his medical expenses, although the statute (Section 13) requires the employer, after notice, to furnish such services. Semmen v. Butterick Publishing Co., 101 Misc. Rep. 285, 166 N. Y. Supp. 993, approved in Goldflam v. Kazmier & Uhl, Inc., 181 App. Div. 140, 168 N. Y. Supp. 87. Nor can a doctor or attorney who has rendered services to the injured employee sue his employer therefor. Bloom v. Jaffe, 94 Misc. Rep. 222, 157 N. Y. Supp. 926; Hirsch v. Zurich General A. & L. Ins. Co., Ltd., 97 Misc. Rep. 360, 161 N. Y. Supp. 380. All these decisions are based on the fact that no such right of action is given

43. Home Life and Accident Co. v. Cobb, — Tex. Civ. App. —, (1920), 220 S. W. 131, 5 W. C. L. J. 916; See, also, Huddleston et al. v. Texas Pipe Line Co. — Tex. Civ. App. —, (1921), 230 S. W. 250.

44. Beach v. Gendler, — Minn. —, (1921), 182 N. W. 607.

45. Hirsch v. Zurich Gen. Acc. Ins. Co., 97 Misc. 360, — App. Div. —, 161 N. Y. S. 380, B 1 W. C. L. J. 1230.

46. In re James G. Houston, 2nd. A. R. U. S. C. C. 229.

by the statute, and that, on the contrary, the statute makes such expenses a part of the compensation provided, and the amount thereof a lien upon the compensation fund."[47]

Where an employer requested the services of a physician, under the Texas Act, he is liable for the costs of such services rendered if he did not inform the physician that he must look to the Texas Employers' Insurance Association for his compensation. The question of the employment being for the jury.[48]

§ 498. **Submission to Physical Examination.**—Under the English Act, the employer has a right to an examination of the employee, and no condition can be imposed as long as the request is made in accordance with the statute, and is not unreasonable in view of all the circumstances.[49]

It has been held in Texas that the Workmen's Compensation Act is the sole authority, by which a court may order a physical examination of the plaintiff without his consent, and if the employee refuses to submit to an examination upon request, the employer should apply to the commission for an order for examination, and such tribunal should then provide therefor.

The courts action in refusing to order an examination, which is largely discretionary, is subject to review for abuse of discretion.

Where the statute provides for examination in specific cases, its exercise in those particular cases is mandatory and not discretionary; but even in these cases a request for an examination must be made.[50]

The legislature is not transcending its powers, when it requires one seeking compensation to submit to a physical examination;

47. Louis Bossert & Sons v. Piel Bros., 182 N. Y. S. 620, (1920), 6 W. C. L. J. 372.

48. Huddleston v. Texas Pipe Line Co., — Tex. Civ. App. —, (1921), 230 S. W. 250.

49. Osborn v. Vickers, (1900), 2 Q. B. 91, 2 W. C. C. 130; Morgan v. Dixon, (H. L.), (1912), 48 Scotch L. R. 296, A. C. 74, 5 B. W. C. C. 184.

50. Tex. Employers' Ins. Assn. v. Downing, — Tex. Civ. App. —, (1920), 218 S. W. 112, 5 W. C. L. J. 582.

and a refusal to submit to an examination is sufficient grounds for discontinuance of compensation while the refusal lasts.[51]

Under the Illinois Act the right, to require a physical examination, is given to any employer for the purpose of determining the nature, extent, and probable duration of the injury received by the employee, and for the purpose of determining the amount of compensation due the employee. The same right to demand an examination is given to the Industrial Commission.[52]

It has been held under the Illinois Workmen's Compensation Act, Sec. 12, providing for physical examination of the injured employee on request of the employer that this requires submission to examination in all cases where the employee is entitled to receive disability benefits, even where the employer denies liability. If making the examination at the time of the hearing places the employee at a disadvantage, it is the duty of the commission, upon request, to continue the hearing so as to give the employee a chance to properly present his case.[53]

It has been held that where an employee claims compensation for an injury to his eyes and the employer, within reasonable time before the case is called for a hearing, requests a physical examination by a specialist selected by the employer or the Industrial Commission, and advances money for the purpose of covering the expense of the examination, it is error for the commission to proceed with the hearing without requiring the employee to submit to the examination.[54]

Where the uncontradicted evidence is that an X-ray examination and photographs are unnecessary the employee cannot be denied compensation for refusal to comply with a request to submit to such examination and have photographs taken.[55]

51. Texas Employers' Ins. Assn. v. Downing, 218 S. W. 112, — Tex. Civ. App. —, 5 W. C. L. J. 582.

52. Illinois Act, Section 12.

53. Jackson Coal Co. v. Indus. Comm., — Ill. —, (1920), 128 N. E. 813, 7 W. C. L. J. 188; Jackson Coal Co. v. Indus. Comm., — Ill. —, (1920), 128 N. E. 815, 7 W. C. L. J. 190.

54. The Hafer Washed Coal Co. v. Indus. Comm., 293 Ill. 425, 127 N. E. 752, 6 W. C. L. J. 293.

But where an employee refuses to submit to a medical examination to determine his condition and there is evidence that he has recovered from his disability, payment of compensation should be suspended during the time he persists in refusing to submit to proper medical examination.[56]

Where the employee's counsel announced before the trial that he would not permit a physical examination of his client, but no demand for such examination was made after the employer's physician arrived, and the employer's physician appeared and testified, it was held that this did not constitute a refusal on the part of the employee to submit to a medical examination at the trial within the meaning of the New Jersey Act.[57]

§ 499. **Autopsy.**—Under some acts an employer is given the right to have an autopsy performed for the purpose of clarifying doubtful issues, but this right should be exercised with the greatest of caution, so that relatives of deceased may not be caused any more mental distress than is absolutely necessary in view of all the circumstances.

A refusal by the next of kin to allow an autopsy does not deprive the Industrial Board of jurisdiction to proceed to final disposition of the case.

Where an employer failed to object before trial and award he waived his right to have an autopsy performed.

The employer cannot exercise his right to an autopsy where the cause of death is clearly apparent.

Where the next of kin told the agent of the employer that she would not allow an autopsy unless absolutely necessary, but that she would talk to the employer about it, this was held to be no unequivocal refusal to grant the right to do so, under the Indiana Act § 27, giving the employer that right.[58]

55. U. S. Fidelity & Guaranty Co. v. Wickline, — Neb. —, 170 N. W. 193, 18 N. C. C. A. 664.

56. Rose v. Desemond Charcoal & Chemical Co., — Mich. —, 172 N. W. 415, 4 W. C. L. J. 238.

57. Birmingham v. Lehigh & Wilkes-Barre Coal Co., — N. J. L. —, 95 Atl. 242.

58. Indianapolis Abattoir Co. v. Bryant, — Ind. App. —, 119 N. E. 24, 1 W. C. L. J. 968.

CHAPTER XII.

Compromise, Satisfaction, Release, And Arbitration.

Sec.
500. Compromise or Amicable Settlement.
501. Release.
502. Satisfaction.
503. Arbitration.

§ 500. **Compromise or Amicable Settlement.**—Amicable settlements, between the employer and the employee, of claims arising under the compensation act are looked upon with favor both in England and in this country, when such settlements comply strictly with the provisions of the statute and are open and fair to both parties.

Where a dependent of a deceased employee entered into a settlement with the insurance carrier which provided that payment should be made in accordance with the compensation act and as long as required under that act, not being based upon a consideration of forbearance to sue, but on the mutual mistake that the employee, though injured while engaged in interstate commerce, was within the scope of the act, was without consideration, and did not amount to a binding settlement.[59]

The acceptance of payments, that were conceded to be due, where the injured employee was assured that it was not a waiver of his common law rights and did not amount to a compromise and settlement that precluded him from having recourse to his common law remedy to which he was entitled, because of the fact that, at the time of his injury he was engaged in work of a maritime nature, was not a waiver of his common-law remedy.[60]

59. Nelson v. London Guarantee and Accident Co., Ltd.,—Cal.—, 189 Pac. 306, 6 W. C. L. J. 6; Pinkney v. Erie R. Co., — Pa. —, 109 Atl. 700, 5 W. C. L. J. 892.

60. Gray v. New Orleans Dry Dock & Shipbuilding Co., 146 La. 826, (1920), 84 So. 109, 6 W. C. L. J. 46.

Settlements made in accordance with the statutory provisions will be upheld and will operate as a bar to common-law rights against the employer.[61]

A settlement receipt, neither filed nor approved by the board, does not prevent action by the board in a proceeding for additional compensation.[62]

In an Illinois Case the court said: "While the receipt and release given at the time of the settlement of July 20, 1916, made no reference to the Workmen's Compensation Act, this was clearly a settlement or agreement made under the act. It is true that the provisions of the act were not followed in making this settlement, as Williams was receiving for his services $50 per month, and under this settlement he was paid in full for the time lost. Plaintiff in error was operating under the act, and any settlement or agreement made with an injured employee must be considered as having been made under the act, whether so expressly stated or not. It is contrary to the policy of the act to allow an employer while choosing to come under its provisions by not filing an election in writing to the contrary, to relieve himself from liability under the act by private agreement or contract with the employee. Chicago Railways Co. v. Industrial Board, 276 Ill. 112, 114 N. E. 534. This was such an agreement as is contemplated by paragraph (h) of section 19 of the act, and as the petition for review was filed with the commission within 18 months after the agreement was entered into, the applicant was properly allowed to show that his disability had recurred subsequent to the making of the agreement. Arnold & Murdock Co. v. Industrial Board, 277 Ill. 295, 115 N. E. 137."[63]

61. Barry v. Bay State Street Co., 222 Mass. 366, 13 N. C. C. A. 624; Pigeon v. Employers' Liability Assur. Corp., 216 Mass. 51, 102 N. E. 932, 4 N. C. C. A. 516; Cripp's Case, 216 Mass. 586, 4 N. C. C. A. 546, 104 N. E. 565.

62. Adams v. W. E. Wood Co., 203 Mich. 673, 169 N. W. 845, 3 W. C. L. J. 311, 18 N. C. C. A. 749; Bates v. J. Holding & Co., (1914), 7 B. W. C. C. 80; Maxwell's Case,—Me.—, (1921), 111 Atl. 849.

63. Wabash Ry. Co. v. Indus. Comm., 286 Ill. 194, 121 N. E. 569, 3 W. C. L. J. 435.

The Industrial Commission does not have the right and will not approve an agreement that does not conform to the provisions of the statute regarding such settlements,[64] especially is this true as to lump-sum settlements, the state being also interested therein.[65]

It is now provided under most acts that the Industrial Commission must approve all voluntary settlements made between the employer and the injured employee before such settlements are valid.[66]

"It is within the power of the legislature to provide that no agreement by an employee to waive his right to compensation under the act shall be valid."[67]

The mere filing of an agreement with the board does not, in the absence of an affirmative approval on their part, become final.[68]

An agreement filed with and approved by the board is a substitute for an award and is of like standing when it is necessary to place them in judgment to enforce a recovery.[69]

Where an employer paid a substantial sum in consideration of a release from liability for injuries to a workman, the settlement

64. Brabon v. Gladwin Light & Power Co., 201 Mich. 697, (1919), 167 N. W. 1024, 2 W. C. L. J. 302, 18 N. C. C. A. 749.

65. Pinkney v. Erie R. Co.,— Pa.—, 109 Atl. 700, 5 W. C. L. J. 892.

66. Rosensteel v. Niles Forge & Mfg. Co., Ohio Indus. Comm., (1914), 7 N. C. C. A. 798; Kricinovich v. American Car & Fdry. Co., 192 Mich. 687, 159 N. W. 362: State v. Duluth Diamond Drilling Co. v. District Court, 129 Minn. 423, 152 N. W. 838; International Coal and Mining Co. v. Indus. Comm.,—Ill.—, (1920), 127 N. E. 703, 6 W. C. L. J. 278.

67. Opinion of Justices, 209 Mass. 607, 1 N. C. C. A. 557, 96 N. E. 308; International Coal and Mining Co. v. Indus. Comm., — Ill. — (1920), 127 N. E. 703, 6 W. C. L. J. 278.

68. Shaffer v. D'Arcy Spring Co., 199 Mich. 537, 165 N. W. 825, 18 N. C. C. A. 749.

69. Spooner v. P. D. Beckwiths Estate, Inc., 183 Mich. 323, 149 N. W. 971, 7 N. C. C. A. 798; Pedlow v. Swartz Elec. Co.,—Ind. App.—, 120 N. E. 603, 18 N. C. C. A. 746; Aetna Life Ins. Co. v. Shively,—Ind. App. —, 121 N. E. 50, 18 N. C. C. A. 746; In re Stone, 64 Ind. App.—, 117 N. E. 669.

was valid, even though the amount paid was the exact sum due under the compensation act.[70]

In a Michigan case the board set aside a settlement agreement wherein the consideration was considerably less than that provided under the act. The court on appeal said: "The rule is that a release may be rescinded for a mutual mistake of law. Kirchner v. New Home Sewing Machine Co., 135 N. Y. 189. Whether placed upon the ground of constructive fraud, or mistake of fact as well as of law, the law forbids that a party who, with full knowledge of the ignorance of the other contracting party, has not only encouraged that ignorance, but has knowingly deceived and led that other into a mistaken conception of his legal rights, should shield himself behind the doctrine that a mere mistake of law affords no ground for relief. We think that, placing its action upon either ground, the board did not err in acting, notwithstanding the so-called settlement agreement."[71]

In a New Jersey case it was held that an erroneous belief that an employee injured in a maritime accident came within the compensation act, all the facts being known at the time, was a mistake of law and would not invalidate a compromise and settlement arising out of such injury or death.[72]

Under the Washington Act a city cannot compromise a claim by the payment of a lump sum, and thus substitute a remedy other than that provided by the act and charter.[73]

Where a minor was found to have suffered greater injuries than was supposed at the time when an agreement was entered into with the employer, it was held that a further award should be made under the circumstances even though the employer had paid the former award, that the second award was in reality the result of the commission's power to set aside a compromise. The

70. Odrowski v. Swift & Co, 99 Kan. 163, 162 Pac. 268, 18 N. C. C. A. 956; Fuller v. Wright,— Kan.—, 189 Pac. 142, 6 W. C. L. J. 42.

71. Carpenter v. Detroit Forging Co.,—Mich.—, 157 N. W. 374, 13 N. C. C. A. 620.

72. Obrien v. Det Forende Damphibs Selskab, — N. J. App. —, 109 Atl. 517, 5 W. C. L. J. 867.

73. State v. Carroll,—Wash.—, 162 Pac. 593, 14 N. C. C. A. 932.

court said: "The commission has very broad power in that field, enabling it to protect minors or others who may, through mistake, make an improvident settlement. We thus treat the matter the same as if respondent, Schmidt, were an adult." [74]

The voluntary payment of compensation by the employer and the acceptance of such payments by the employee is such an agreement as is contemplated by the Illinois Act paragraph (h) section 19. The court said: "In order to entitle Mustaccio to compensation it was incumbent to show that his disability recurred since the hearing which resulted in the decision of August 6, 1914, and that his condition had changed since that time. Under the statute that decision was conclusive upon Mustaccio that at that time he was not suffering from any disability as the result of the injury. Evidence on behalf of both parties was heard on the hearing which resulted in that decision. Physicians who examined Mustaccio testified on both sides, and the committee of arbitration and the Industrial Board were of the opinion, as a result of the facts presented, that Mustaccio at that time was not suffering from any disability. * * * As there was no proof whatever that his disability had recurred, but, on the other hand, all the proof was to the effect that his condition had remained the same, the decision of August 6, 1914, was conclusive, and the Industrial Board, after hearing all the testimony, should have dismissed the petition upon the motion of the plaintiff in error." [75]

The finding of an arbitration committee that the employee agreed to a settlement on the basis of a partial disability does not preclude the employee, where the agreement was made after the committee had found that total disability should cease on that date, to which finding the employee did not assent and did not waive his right to appeal.[76]

74. Menominee Bay Shore Lbr. Co. v. Indus. Comm., 162 Wis. 344, 156 N. W. 151, 16 N. C. C. A. 803.

75. Simpson Const. Co. v. Indus. Bd., 275 Ill. 366, 114 N. E. 138, 15 N C. C. A. 391.

76. Duprey v. Casualty Co., 219 Mass. 189, 106 N. E. 686, 7 N. C. C. A. 799.

"Where an injured employee and his employer enter into an agreement with reference to compensation under the terms of the act, and file the same with the Industrial Accident Board, such action constitutes a waiver on the part of the employer of the statutory requirement that the employee shall file his claim within 6 months from the date of the injury."[77]

Where a sister of the deceased entered into an agreement with the insurance carrier for compensation stating that there was no one wholly dependent upon the deceased, and the agreement was approved by a justice, it was held that such an agreement did not excuse a partially dependent father from making a claim within the statutory time for making such claim.[78]

In a Kansas case, the court said, in discussing the legality of a voluntary settlement in which it was claimed that the consideration was grossly inadequate: "The appellant chiefly complains of one of the instructions given by the court, and of the overruling of its motion for judgment on the special findings. The criticized instruction read:—

'If you find from the preponderance of the evidence that said release was obtained by means of false representations, substantially as alleged in plaintiff's reply, or that the consideration thereof was grossly inadequate as compensation for the injuries sustained by plaintiff while in defendant's employ, then it will be your duty to determine whether or not the plaintiff was wholly or partially incapacitated from work as the result of the injury so received while in defendant's employ.'

"In justice to the trial court it should be mentioned that the decisions of this court on this point (Odrowski v. Swift Co., 99 Kan. 163, 162 Pac. 268, and Weathers v. Bridge Co., 99 Kan. 632, 162 Pac. 957) were not handed down until after the instant case was tried below. In the Odrowski case, it was distinctly declared that a voluntary settlement, release, and satisfaction of an injured workman's claim against his employer under the work-

77. Curtis v. Slater Const. Co., 194 Mich. 189, 160 N. W. 659, 14 N. C. C. A. 785.

78. Giannotti v. Giusti Bros., 41 R. I. 122, 102 Atl. 887, 17 N. C. C. A. 164.

men's Compensation Act cannot be set aside merely because of the gross inadequacy of the amount paid by the employer to effect such settlement and release. While the rights of injured workmen and the liabilities of their nonculpable employers are defined by the statute and certain modes of determining compensation for workmen's injuries are prescribed therein, those statutory modes of agreements and awards are not exclusive. Workmen are not in any respect under guardianship or other disability; they and their employers are free agents; they may release their employers from liability for injuries on any agreed terms satisfactory to both. Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Td. 441, L. R. A. 1915C, 960. And where no fraud has been practiced on the workman or on his employer, and no mutual mistake inheres in the contracts of settlement and release, the courts are bound to respect and enforce the settlements made by the parties, and are powerless to disturb such contracts of settlement.'' [79]

An agreement between an employer and employee approved by the industrial board is good as far as it goes in complying with the act, and is given the same recognition as an award; but where it fails to provide compensation for permanent partial disability it is incomplete, and the board still has jurisdiction of the subject matter, even though the settlement was intended as a compromise settlement of all compensation, and may settle any other disputes in connection therewith.[80]

An agreement by an insurer to pay a claim under the compensation act in accordance with the terms of a settlement is not an admission of any common-law liability. The approval of a claim

79. Dotson v. Proctor & Gamble Mfg. Co., 102 Kan. 248, 169 Pac. 1136, 1 W. C. L. J. 613.

80. In re Stone, 64 Ind. App. —, 117 N. E. 669, 1 W. C. L. J. 181, 18 N. C. C. A. 744; Mass. Bond & Ins. Co. v. Indus. Comm., 176 Cal. 488, 168 Pac. 1050, 1 W. C. L. J. 484, 18 N. C. C. A. 950; Employee's Credit Co. v. Indus. Comm., 177 Cal. 46, 169 Pac. 1001, 1 W. C. L. J. 467; Spooner v. Beckwith's Estate Inc., 183 Mich. 323, 149 N. W. 971, 7 N. C. C. A. 799.

by an industrial commission must be a legal approval and any attempt to exceed its statutory powers is nugatory.[81]

Where parties settled a claim under the compensation act without action, the attorney has no lien on the money for his services.[82]

An agreement for compensation, entered into with full knowledge of the details of the accident and approved by the industrial board, cannot be set aside on the ground that the accident did not arise out of the employment, and that there was no provision in the settlement for payment during a period of partial disability which might ensue in the course of recovery. The statute supplies a way by which any change in the condition of the workman may be presented to the board and the proper relief obtained.[83]

Under an act authorizing an award if not settled by agreement of the parties, a settlement, made without fraud after injury, is binding. "Article 5246nn of the Texas Act providing that 'no agreement by an employee, to waive his rights to compensation under this act shall be valid,' has reference entirely to agreements in that respect made prior to the injury. As the parties had the right, it is thought, to make the agreed settlement, the law attaches binding force to such agreement."[84]

A voluntary settlement between the employer and the widow of a deceased employee in accordance with statutory provisions, is not vitiated because of the fact that the agreement failed to mention whether the deceased was engaged in interstate commerce. The employer's ignorance of the law as to whether he was liable under the Federal Act or the Compensation Act is not such a mistake as would authorize the setting aside of a partly performed settlement made under the state law.[85]

81. London Guar. & Acc. Co., Ltd., v. Sterling, 233 Mass. 485, (1919), 124 N. E. 286, 4 W. C. L. J. 610.

82. Kratz v. Holland Inn. —Ia.—, (1919), 173 N. W. 292, 4 W. C. L. J. 487.

83. Home Packing & Ice Co. v. Cahill, — Ind. App. —, (1919), 123 N. E. 415, 4 W. C. L. J. 184.

84. Jenkins v. Texas Employers' Ins. Assn., — Tex. Civ. App. —, (1919), 211 S. W. 349, 4 W. C. L. J. 143.

85. Bach v. Interurban Ry. Co., 171 N. W. 723, 4 W. C. L. J. 63; Kuhn v. Pennsylvania R. Co., — Pa. —, 113 Atl. 672, (1921).

Where the district court authorized the guardian of an employee who was rendered insane by the accident, to make a lump-sum settlement with the employer and to execute a release, it was held that this was not even prima facie evidence of the reasonableness of the settlement and the commission was under no duty to approve it, for the district court had no authority to make any such order, as this matter lay within the exclusive jurisdiction of the commission.[86]

Where an agreement is reached between an employee and his employer, and subject to the approval of the commissioner, as provided in the statute, and the insurer acts upon the agreement and pays part of the stipulated sum to the injured employee before the agreement has been approved, the insurer is bound thereby, and the employee has an action thereon without reference to the insolvency of the employer.[87]

In order to set aside a settlement and release on the ground of mistake it must be shown that there was a mutual mistake as to the extent of the employee's injuries and of his disability in consequence thereof.[88] A mere misconception on the part of the insurer as to the law would not of itself be such a mistake as would authorize the setting aside of the compensation agreement.[89]

Failure to file an agreement with and obtain the approval of the Massachussetts Industrial Board will preclude an employee from relying upon the provison of the statute authorizing the board, upon notice of disagreement as to the continuance of payments under an agreement, to assign the case for hearing before a member of the board.[90]

86. Reteuna v. Indus. Com., — Utah, —, (1919), 185 Pac. 535, 5 W. C. L. J. 327.

87. Adel v. Casualty Co. of America, — Iowa, — (1920), 175 N. W. 846, 5 W. C. L. J. 521.

88. Weathers v. Kansas City Bridge Co., 99 Kan. 632, 162 Pac. 957, 18 N. C. C. A. 956.

89. Frankfort Gen. Ins. Co. v. Conduitt, — Ind. App. —, 127 N. E. 212, 6 W. C. L. J. 25.

90. Courtney's Case, 231 Mass. 469, 121 N. E. 426, 18 N. C. C. A. 743.

The insurance carrier need not be a party to an agreement entered into between the employer and employee for compensation, where the claim is within the Indiana Act.[91]

In affirming the approval of a settlement between the employer and the principal dependent over the objection of the insurer, the court said: "The statute (section 20) does not make the approval of the commission depend on the consent of the insurer, nor even on the consent of all the claimants, but only on the consent of the employer and principal dependent. The approval of the commission was therefore properly given, even though the insurer had protested more vigorously than it seems to have done in this case, and by the mandate of the statute 'such approval shall constitute an award.'" The court held further that while the carrier was entitled to a hearing, without which the award could not be deemed conclusive as to it, yet it appeared that it had had such a hearing.[92]

The question as to the validity of an agreement orally made, for the payment of compensation, in view of the statute of frauds, was raised in a New Jersey case but the court held that the decision of this question was unnecessary to the disposition of the case.[93]

While an agreement entered into after an accident may be evidential of a right to compensation, and does avoid the statute of limitations, yet it is not conclusive evidence, nor an estoppel, to deny, the happening of an accident.[94]

It appeared that certain letters passed between one acting for an injured employee and the employer, which letters recited the amount of compensation to be paid as determined by the rating department of the commission and accepted by the employee, and

91. Hassen v. Elm Coal Co., 184 App. Div. 715, 172 N. Y. S. 430, 18 N. C. C. A. 744; Aetna Life Ins. Co. v. Shiveley, — Ind. App. —, 121 N. E. 50, 18 N. C. C. A. 744.

92. Schlenker v. Garford Motor Truck Co., 183 App. Div. 166, 170 N. Y. S. 439, 18 N. C. C. A. 745, 2 W. C. L. J. 374.

93. Burns v. Edison, 92 N. J. L. 288, 105 Atl. 717, (1919), 18 N. C. C. A. 745, 3 W. C. L. J. 645.

94. Burns v. Edison, 92 N. J. L. 288, 105 Atl. 717, (1919), 18 N. C. C. A. 746, 3 W. C. L. J. 645.

that the employer had made several unsuccessful attempts to deliver the monthly vouchers for compensation and thereafter on request of the employee the employer refused to pay. In the proceedings that followed, the court, in holding that there was a sufficient agreement to avoid the statute of limitations, said: "To constitute an agreement within the meaning of the act, certainly no more should be held to be necessary than an understanding between the parties as to the amount to be paid, and a promise on the part of the employer to pay that amount."[95]

An agreement between an employee and the employer, where the employer had not elected to come under the act, is not binding nor a bar to an action to recover damages sustained.[96]

An incomplete agreement, although filed with the board, will not terminate the board's jurisdiction, and it may be ignored in awarding further compensation.[97]

A mere agreement for settlement according to the provisions of the act will not give the commission any jurisdiction which they would not otherwise have, and an attempt to pass on a question of which it had no jurisdiction would be of no effect.[98]

"When the employer and employee agree upon compensation and file their written agreement with the Industrial Accident Board and it is approved, jurisdiction of the parties is thereby conferred upon the board to act in the premises."[99]

The board, after the approval of an agreement, may, upon proper application, determine whether the agreement and approval

95. Northwestern Pac. R. Co. v. Indus. Comm., 173 Cal. 652, 161 Pac. 123, 18 N. C. C. A. 747.

96. Nelson v. Ironwood & B. R. Light Co., 204 Mich. 347, 170 N. W. 45, 18 N. C. C. A. 747; But see Fuller v. Wright, — Kan. —, 189 Pac. 142, 6 W. C. L. J. 42.

97. Standard Cabinet Mfg. Co. v. Iliff, — Ind. App. —, 119 N. E. 479, 18 N. C. C. A. 747.

98. Hassen v. Elm Coal Co., 184 N. Y. App. Div. 715, 172 N. Y. S. 430, 18 N. C. C. A. 749.

99. Adams v. W. E. Wood Co., 203 Mich. 673, 169 N. W. 845, 18 N. C. C. A. 749, 3 W. C. L. J. 311.

have foundation, and may annul the order approvnig the agreement if it deems such action proper.[1]

An agreement for compensation under the New Jersey Act may be enforced by any one for whose benefit it has been made. And when the agreement has been made for the maximum sum allowed by the act, it may be enforced, by an action in the supreme court.[2] But when the compensation is not for the maximum amount or has not been definitely settled, the court of common pleas has jurisdiction.[3]

A common-law action is necessary to enforce an ordinary agreement. The court said: "If defendant could have shown to the satisfaction of the court, as he offered to do, that no accident in fact occurred as claimed, the defense to a compensation suit would have been perfect, whatever might have been the right of recovery at common law on the agreement as a compromise and settlement of a disputed claim."[4]

The question "whether there was an agreement between the parties to make compensation, under the statute, without resorting to the court of common pleas, by petition, was a mixed question of law and fact."[5]

The New Jersey Compensation Aid Bureau has no authority to compel parties to enter a compensation agreement. It may invite them to do so and if they do not may certify the case to the court of common pleas. A statement that such certification will follow failure to comply with the invitation does not constitute compulsion.[6]

1. Aetna Life Ins. Co. v. Shiveley, — Ind. App. —, 121 N. E. 50. 18 N. C. C. A. 751.

2. Holzapfel v. Hoboken Mfgs' Ry. Co., 92 N. J. L. 193, 104 Atl. 209, 18 N. C. C. A. 752.

3. Parro v. N. Y. S. & W. R. Co., 85 N. J. L. 155, 4 N. C. C. A. 680, 88 Atl. 825.

4. Burns v. Edison, — N. J. L. —, 105 Atl. 717, (1919), 18 N. C. C. A. 752, 3 W. C. L. J. 645.

5. E. I. Dupont De Nemours Powder Co., v. Spocidio, 90 N. J. L. 438, 101 Atl. 407, 18 N. C. C. A. 753.

6. O'Brien v. Det Forende Damphibs Selskab, — N. J. App. —, 109 Atl. 517, 5 W. C. L. J. 867.

§ 501. **Release.**—Where the compensation act requires the Industrial Commission to be made a party to the proceedings and also requires the commission's approval of compensation agreements, the district court has no power to render judgment on a stipulation for a settlement for a lump sum less than that awarded by the commission, without its approval, for: "When the injured employee or his dependent in the event of his death, elects to take compensation, as in the claim now under consideration, the protection of the statute is thrown about him. The moment he files his proceeding with the Industrial Commission the state has a direct interest in the proceeding. It assumes jurisdiction, and, unlike in a civil action in the courts, the claimant has not thereafter the right to settle or compromise his claim without the consent of the commission. This is evidenced by the fact that after the amount of compensation has been determined by the commission the employee himself cannot sue the employer in the event of his refusal to pay the same, but the action must be brought in the name of the state, by its chief legal representative, on behalf of the claimant. The situation in such an action, or in the proceeding outlined before the commission, is similar to that of one under some legal disability so far as his right to control, conduct or dismiss the proceeding is concerned. This shows the interest of the state in the matter and its complete acquisition of jurisdiction in the premises. The jurisdiction is continuous from the moment the application for compensation is filed by the claimant until the compensation is paid, and, hence neither of the parties has a right to interfere therewith by private arrangement. This authority of the state, once invoked, cannot be cast aside.

"The theory of Workmen's compensation is based largely upon the doctrine that society itself is vitally concerned in the prompt payment of compensation to injured and the dependents of killed employees. It is a matter relating to the promotion of the general welfare. * * * The Industrial Commission is the instrumentality through which the state acts, and it is its duty not only to ascertain all of the facts and determine the amount of compensation to which a claimant is entitled, but to pursue the matter to final judgment in the event the employer refuses to pay. In other

words, the state, as the representative of society at large, steps in and takes charge. Such being the case it follows that the individual claimants, not being solely interested, cannot enter into a release which, will be binding without the consent of the state through the action of the Industrial Commission."[7]

Section 23 of the Illinois Workmen's Compensation Act, which provides that an employee does not have the right to grant a release after application has been made the industrial commission for compensation, applies to the insurer as well, in a claim against the insurer substituted, under the provisions of the act, by reason of the insolvency of the assured.[8]

Where the court approved an agreement for compensation for temporary disability, a subsequent release executed by the employee without consideration or the approval of the court was held not to be a settlement within general statutes of Minn., 1913, Section 8216, authorizing settlements, and did not affect the original settlement. The court said: "There was no consideration for it, nor was it approved by the district court, and the original agreement of settlement between the parties stands, and the respondent is entitled to have the same carried into effect and to recover thereunder."[9]

Where an administratrix accepted settlement for her deceased son's death, of all claims against the company whose negligence caused the death, she did not thereby release the employer, in whose employment he was killed, from liability under the Workmen's Compensation Act, the employer being left free to proceed against the negligent company as though no settlement had been made. The court said: "As was pointed out in Vereeke v. City of Grand Rapids, 203 Mich. 85, 168 N. W. 1019, the act nowhere compels election on the part of the dependent as it does on the part of the injured party himself. We are disposed to hold that

7. Indus. Comm. of Colorado v. London Guarantee and Accident Co., Ltd., 66 Colo. 575, (1919), 185 Pac. 344, 5 W. C. L. J. 155.

8. Illinois Indemnity Exchange v. Indus. Com., 289 Ill. 233, (1919), 124 N. E. 665, 5 W. C. L. J. 42.

9. Clarkson v. N. W. Consol. Mill Co., 145 Minn. 289, (1920), 175 N. W. 997, 5 W. C. L. J. 540.

the releases executed by Romanie Naert to the Cottage Grove Creamery Company were of no force and effect as between the employer of the dead boy and the Cottage Grove Creamery Company, in an action brought by the telegraph company to recover the compensation it is called upon to pay under the award of the board. Section 15 of part 3 clothes the employer with the absolute right to recover such payments as it is obliged to make from the third person legally liable for the injury. Such third person, in this case the Cottage Grove Creamery Company, in adjusting a claim with the legal representatives of the injured person, must be held to have proceeded with knowledge of the fact that it might be called upon to respond to the employer, who is primarily legally liable under the terms of the act to the injured party, or to his dependents in case of his death. The Industrial Accident Board held, under such proofs as were introduced at the hearing that the death of the boy was not caused 'under circumstances creating a legal liability' in the Cottage Grove Creamery Company, that the payment of $200 to Romania Naert was a mere gratuity, and that her releases to the Cottage Grove Creamery Company constituted no bar to her right to compensation from the telegraph company.

"Under our view of the case, it is unnecessary to either agree or disagree with these holdings. So long as the telegraph company is left free to proceed against the Cottage Grove Creamery Company as though no settlement had been made, it has no reason for complaint, and that we hold to be its present status herein."[10]

"A settlement made by the workman with his employer and the insurer of the employer on the mutual assumption that he was entitled to compensation for the loss of one eye only, and a release executed on the same assumption, do nor bar him from thereafter claiming compensation for the injury to the other eye."[11]

10. Naert v. Western Union Tel. Co., 206 Mich. 68, 172 N. W. 606, 4 W. C. L. J. 231.

11. State ex rel. Melrose Granite Co. v. District Court, — Minn. —, (1919), 173 N. W. 857, 4 W. C. L. J. 614.

Where a watchman at a crossing for both an interstate and an intrastate carrier was killed, a release executed by the wife of deceased in favor of the interstate carrier did not affect the liability of the intrastate carrier, where it did not provide for payment of full compensation in accordance with provisions of the State act and was never approved by the commission.[12]

Where a husband has acquired a common-law right of action on account of injuries to his wife, due to defendant's negligence, such right of action is not affected by the wife giving a release to defendant, as the husband, who is a third party, does not come within the provisions of the compensation act.[13]

Under the Michigan Act, as is true under many other acts, an agreement is not final until the board has approved it, and a release given by the injured employee to the insurer, in view of the stipulation agreed upon, is not final until approved by the board.[14]

In a case in which Section 5930, Gen. Stat., 1915, (section 82 of the Workmen's Compensation Act) of Kansas was construed, it was held that in actions to enforce compensation where the validity of a release or other discharge of liability is involved, either party may, when the case is called for trial, demand a trial of that issue by a jury.[15]

Where an employee elected to proceed against his employer for injuries resulting from the negligence of a third party, and assigned to the employer the right of action against the third party, who in turn paid the award of the commission and took a release from the employer in good faith, the employee cannot thereafter have the commission vacate the award, withdraw his claim against

12. San Francisco Oakland Terminal Rys. v. Indus. Comm., 180 Cal. 121, (1919), 179 Pac. 386, 3 W. C. L. J. 682.

13. Erickson v. Buckley, 230 Mass. 467, 120 N. E. 126, 2 W. C. L. J. 633.

14. Shaffer v. D'Arcy Spring Co., 199 Mich. 537, 165 N. W. 825, 1 W. C. L. J. 418; Foley v. D. U. R., 190 Mich. 507, 157 N. W. 45; Dettloff v. Hammond-Standish & Co., 195 Mich. 117, 161 N. W. 949.

15. Vogler v. Bowersock, 102 Kan. 456, 170 Pac. 805, 1 W. C. L. J. 777, 18 N. C. C. A. 957.

16. Sabatino v. Thomas Crimmins Const. Co., 168 N. Y. S. 495, 1 W. C. L. J. 709.

the employer, and sue the third party.[16] But it has been held that a release given by an injured employee to a negligent third party is not binding upon the commission if given under conditions which would render the release voidable.[17]

Where an employee of a news company was injured by a railroad company, which voluntarily paid him for all his claims under the Workmen's Compensation Act relating to injuries arising out of and in the course of the employment under such circumstances as would give rise to liability on the part of persons other than the employer, the employer has a right to have such moneys applied to the discharge of his own liabilities under the compensation act. This, as has been noted in other parts of this work, is now true under most of the acts.[18]

A receipt purporting to cover a final settlement will not bar further proceedings, where the employer and insurer failed to frankly report the entire injury to the applicant. A receipt covers only such injuries as it purports to cover, and not others arising from the same injury but not included in the settlement.[19]

A claim made under the compensation act will operate as a release of all common-law rights of the injured employee against the employer.[20]

The release of an employer does not thereby release a claim against a physician for malpractice.[21] But see page 1252 ante.

A release given by the injured employee will not bar the dependent's claim for a death benefit.[22]

17. In re Jacob A. Seaman, 2nd A. R. U. S. C. C. 238.

18. Rosenbaum v. Hartford News Co., 92 Conn. 389, 103 Atl. 120, 1 W. C. J. 930; Solomone v. Degnon Contracting Co., 184 N. Y. S. 735, (1920), 7 W. C. L. J. 121.

19. Green v. Buick Motor Co., 201 Mich. 86, 166 N. W. 1028, 1 W. C. L. J. 1016, 18 N. C. C. A. 962.

20. Gray v. Brown & Sohler Co., 200 Mich. 177, 166 N. W. 930, 17 N. C. C. A. 171.

21. Viita v. Dolan, 132 Minn 128, 155 N. W. 1077, 11 N. C. C. A. 753; Pawlak v. Hayes, 162 Wis. 503, 156 N. W. 464, 11 N. C. C. A. 752.

22. In re Cripp, 216 Mass. 586, 104 N. E. 565, 4 N. C. C. A. 546; Milwaukee Coke & Gas Co. v. Indus. Comm. 151 N. W. 245, 160 Wis. 247, 9 N. C. C. A. 597; Solomone v. Degnon Contracting Co., 184 N. Y. S. 735, (1920), 7 W. C L. J. 121.

It has been held in a Wisconsin case that where a guardian makes a settlement and gives a release for all claims arising under the compensation act, the minor is not thereby precluded from his common-law rights. Furthermore, a guardian's action in this case without the authority of the court would be a nullity, despite the fact that the commission approved of the settlement. The court said: The guardian's power is limited by the law and his acts which the law does not sanction are not binding on his ward."[23]

An injured employee cannot release a third party, whose negligence caused the injury, so as to bar the insurer's right of action against such third party after paying the compensation allowed under the New York Act.[24]

A release under the California Act given by a citizen in California will bar an action by the employee in Nevada.[25]

A release obtained by fraud or misunderstanding on the part of the employee, will not prevent the board from giving further relief.[26]

A release, given upon payment of a sum less than the amount provided for in the statute, is invalid.[27]

Under the British Act a release and discharge will not bar further proceedings for additional compensation when there is a recurrence of the disability at a future date.[28]

An agreement for compensation for the loss of three fingers, but not stating that it is to cover all claims for additional com-

23. Stetz v. Mayer Boot & Shoe Co., 163 Wis. 151, 156 N. W. 971, 13 N. C. C. A. 623.

24. Woodward v. E. W. Conklin & Son, 171 App. Div. 736, 157 N. Y. S. 948, 13 N. C. C. A. 625.

25. Leach v. Mason Valley Mines Co., 40 Nev. 103, 161 Pac. 513, 18 N. C. C. A. 964.

26. Pabisz v. Newark Spring Mattress Co., 36 N. J. L. J. 114; Ellis v. The Lochgelly Iron & Coal Co., 46 Sc. L. R. 960, 2 B. W. C. C. 136; Huckle v. London County Council, (1910), 3 B. W. C. C. 536; Macandrew v. Gilhooley, (1911), 4 B. W. C. C. 370.

27. Jenkins v. T. Hogan & Sons, Inc., 177 App. Div. 36, 163 Supp. 707.

28. Glancy v. John Watson, (1915), 8 B. W. C. C. 391.

pensation, will not bar a claim for an injury to the hand arising out of the same accident.[29]

A release may be rescinded for a mutual mistake of law. And where one has knowingly encouraged another in a mistaken conception of his legal rights, the guilty party cannot shield himself behind the doctrine that a mere mistake of law affords no ground for relief.[30]

Where an employee of a railroad company brought suit for personal injuries under the employer's liability act, and dismissed that suit and executed a release to the company in consideration of the payment of a sum of money, it was held that he had released his entire right of action so as to preclude an action against a third party whose negligence contributed thereto, although the consideration of the release was computed on the basis of what would have been due under the workman's compensation act.[31]

Where an insurer denied liability for additional compensation for permanent disability, claiming that a release given in consideration of an agreement and payment of compensation for temporary disability extinguished all claim, the court said: "The payment of the temporary disability award, and the release thereon, was no bar to the subsequent proceeding for compensation for the permanent disability caused by the injury. It did, in terms, purport to release the company from all claims for compensation by reason of the injury, but the money paid was sufficient only to satisfy the award previously made, and there was no consideration for the release of any additional right or of any demand for the permanent disability finally resulting from the injury. Futhermore, by the provisions of the California act (section 32b), no release is valid unless it provides for the payment of full compensation, or unless it shall be approved by the commission. This release was not approved by the commission and it did not pro-

29. Lemieux v. Contractor's Mutual Liab. Insur. Co., 223 Mass. 346, 111 N. E. 782; In re Hunnewall, 220 Mass. 351, 107 N. E. 934.

30. Carpenter v. Detroit Forging Co., 191 Mich. 45, 157 N. W. 374.

31. Middaugh v. Des Moines Ice & Cold Storage Co., 184 Iowa 969, 169 N. W. 395, 18 N. C. C. A. 947.

vide for payment of full compensation. Therefore it is not valid under the act."[32]

A release under the Kansas Act, which has not been filed with the clerk of the court within 60 days after it was made, is not valid, nor will it operate as a bar to further proceedings.[33]

The Supreme Court of Kansas holds that inadequacy of consideration will not invalidate a release where there was no fraud or mutual mistake.[34]

Where the employees of a company paid towards the upkeep of a collective insurance, and upon injury to one of the employees an agent settled with the injured employee and obtained a release without acquainting the employee of the fact that the settlement and release was to operate as a discharge of the employer's liability the court held that the release given to the agent of the insurer would not release the employer.[35]

In holding that an agreement with an employee for a release of all claims for injuries resulting from accident during the term of employment was invalid, the court said: "The Workmen's Compensation Act is a declared public policy of the state upon the subject embraced in the statute, and provides a method by which employers may exempt themselves from providing and paying compensation under the act to employees for accidental injuries sustained and arising out of and in the course of the employment. It is contrary to the policy of the act to allow an employer, while choosing to come under the provisions of the statute by not filing an election in writing to the contrary, to relieve itself from liability

32. Mass. Bond & Ins. Co. v. Indus. Comm., 176 Cal. 488, 168 Pac. 1050, 18 N. C. C. A. 949; Employee's Credit Co. v. Indus. Acc. Comm., 177 Cal. 46, 169 Pac. 1001, 18 N. C. C. A. 963; Jenkins v. T. Hogan & Sons, 177 App. Div. 36, 163 N. Y. S. 707, 18 N. C. C. A. 950,

33. Rodarmel v. Carey Salt Co., 101 Kan. 141, 165 Pac. 668, 18 N. C. C. A. 949.

34. Dotson v. Proctor & Gamble Mfg. Co., 102 Kan. 248, 169 Pac. 1136, 18 N. C. C. A. 953; Odrowski v. Swift Co., 99 Kan. 163, 162 Pac. 268, 18 N. C. C. A. 956; Weathers v. Kansas City Bridge Co., 99 Kan. 632, 162 Pac. 957, 18 N. C. C. A. 951.

35. Vogler v. Bowersock, 102 Kan. 456, 170 Pac. 805, 18 N. C. C. A. 957, 1 W. C. L. J. 777.

under the act by private agreement or contract with the employee."[36]

It has been held that an agreement made at the time of employment, releasing the employer from all claims arising on account of hernia, the existence of which then appeared, was ineffectual under section 27a of the California Act (St. 1917. P. 855) to exempt the employer from liability for compensation fixed by the act.[37]

§ 502. **Satisfaction.**—The fact that an employee had obtained compensation, for total incapacity from another master for a subsequent injury, to which he was not entitled, will not defeat his right to recover for total disability against the insurer of the first master, for whatever fraud existed was perpetrated upon the second master.[38]

Where an employee was killed in the course of his employment by the negligence of a street car company, it was held that a settlement and release of the tort-feasor would not bar a claim against the employer, even though to hold otherwise would amount to double compensation. This is contrary to the general rule and under the New Jersey Act, as amended, the employer is entitled to reimbursement for compensation paid, when recovery is had against a negligent third party.[39]

Where it appeared that the sum stipulated in the agreement was sufficient in amount to a settlement, but the sum received by the employee in consideration of a release included a portion of his wages, it was held that there was an accord but no satis-

36. Chicago R. Co. v. Indus. Bd., 276 Ill. 112, 114 N. E. 534 18 N. C. C. A. 960.

37. Hines v. Indus. A. C. Calif., — Cal. —, 188 Pac. 277, 5 W. C. L. J. 773.

38. Home Life & Accident Co. v. Corsey, — Tex. Civ. App. —, (1919), 216 S. W. 464, 5 W. C. L. J. 319.

39. Newark Paving Co. v. Klotz, 86 N. J. L. 690, 91 Atl. 91, 7 N. C. C. A. 810; N. Y. Shipbuilding Co. v. Buchanan, 84 N. J. L. 543, 87 Atl. 86; Redorfo v. Cleveland Tel. Co., Ohio Indus. Comm., (1915), 7 N. C. C. A. 813; Mercer v. Ott, 78 W. Va. 629, 89 S. E. 952; Solomone v. Degnon Contracting Co., 184 N. Y. S. 735, (1920), 7 W. C. L. J. 121.

faction, and that the receipt did not contain a genuine agreement under the act.[40]

There must be no double satisfaction for the same injury, and where the injured employee receives compensation in full from either his employer or the negligent third person, he has no further claim against the other party; but under some acts the election to hold one will not thereby release the other from liability for the difference between the amount recovered and the amount provided by the statute.[41]

§ 503. **Arbitration.**—In discussing the question of arbitration under the Kansas Act, the Supreme Court of Kansas said: "The ground on which the award was canceled was that the arbitrator acted without authority, in that the defendant did not consent to arbitration in writing; it being admitted that no affirmative consent was given, either written or oral. The ruling was based on section 11 of chapter 226 of the Laws of 1917, which provides, among other things, that 'the consent to arbitration shall be in writing and signed by the parties.' That provision governs the conduct of the parties when the employer obeys the law and consents to arbitration. In the opinion in the case of Goodwin v. Packing Co., 104 Kan. 747, 749, 180 Pac. 809, 810, it was said:

" 'It is contemplated that compensation shall be settled by agreement or by arbitration, and without litigation. If there be an agreement, that ends the matter. In default of agreement, the statute requires compensation to be settled by arbitration, and employer and workman are expected to sign a writing expressing such consent and stipulating respecting matters which they desire to be referred. The language of section 11 is that if the establishment committee be set aside as arbitrator 'the matter shall be settled by a single arbitrator,' etc. In the statute which was

40. Hawkes v. Richard Coles and Sons, (1910), 3 B. W. C. C. 163.

41. Walsh v. N. Y. C. & H. R. R. R. Co., 204 N. Y. 58, 97 N. E. 408, 37 L. R. A. (N. S.), 1137; Gambling v. Haight, 59 N. Y. 354; Miller v. N. Y. Rys. Co., 171 App. Div. 316, 157 N. Y. S. 200; Tester v. Otis Elevator Co., 169 App. Div. 613, 155 N. Y. S. 524; Solomone v. Degnon Contracting Co., 184 N. Y. S. 735, (1920), 7 W. C. L. J. 121.

superseded by the act of 1917 the language was 'the matter may be settled,' etc. Gen. Stat. 1915, section 5918. The result is, it is wrongful for either employer or employee to refuse to arbitrate in case of failure to agree on compensation.

"The only qualification of the positive mandate to settle compensation by arbitration is that contained in section 20 of the cited statute, which gives the workman remedy by action. If the employer shall have refused to consent to arbitration, the claim may be determined and enforced by action. However, a workman is not obliged to resort to action because the employer has refused to perform his duty under the statute; that remedy is permissive and cumulative.

"In the Goodwin Case the question was whether or not omission of the workman to apply for appointment of an arbitrator barred resort to the remedy by action. The opinion carefully limited the discussion to that particular question. It seems, however, that the following paragraph of the opinion has been interpreted to indicate that arbitration may be defeated by the wrongful conduct of the employer in refusing to consent to arbitration:

'The establishment committee having been set aside, and no agreement on an arbitrator having been reached, the workman must perfect the machinery of arbitration by applying for appointment of an arbitrator, or he will be precluded from enforcing compensation by action. If, however, at any stage of the proceedings, the employer definitely refuses to consent to arbitration, the workman who, in default of agreement on compensation, has consented to arbitration, need not go further with arbitration. The statute does not require him to do futile things. He cannot be at fault for not procuring appointment of an arbitrator when such appointment would be useless on account of the declared attitude of the employer.' Goodwin v. Packing Co., 104 Kan. 747, 750, 180 Pac. 809, 810.

"The futility and uselessness spoken of referred, of course, to the needlessness on the workmen's part, in order to avoid fault, of striving to utilize provisions of the statute by which the employer has refused to be bound at all.

"In the Goodwin Case the numerous varieties of conduct which may be displayed by employer and workman in the settlement of compensation were noted. In some regrettable instances the employer, or the insurance carrier who takes charge of his case, plays the part of the dog in the manger. While consent to arbitration is not definitely refused, it is not definitely given by promply signing an agreement, as the statute requires, and the matter is kept hanging in the air. After a workman has made fair effort to secure consent expressed in writing, and the writing is not executed, the employer may be regarded as having refused to consent. In this instance the court did not find that the employer refused to consent. Therefore the condition precedent to action did not exist, and the workman was obliged to pursue the remedy by arbitration. However this may be, a workman may compel arbitration, whether the employer consent or not." [42]

Where an employee attempted to settle by arbitration, but refused to arbitrate before a committee, and the employer refused to arbitrate except before such committee, and the employer made no proper application for appointment of an arbitrator, it was held, construing sections 10, 11, 12 and 20 of chapter 226, Laws of Kansas, 1917, that the action for compensation was maintainable despite such omission.[43]

It was held in earlier cases construing the Kansas Act, that adjustment by agreement or by arbitration involves the voluntary action or consent of the parties, and nothing in the act indicates that either is or can be compelled to adopt one method of adjustment rather than another or that an effort to obtain one must be made before another is available.[44]

An agreement between the injured employee and the employer, with reference to compensation under the terms of the Michigan

42. Roper v. Hammer, — Kan. —, 187 Pac. 858, (1920), 5 W. C. L. J. 690.

43. Goodwin v. Cudahy Packing Co., 104 Kan. 747, 180 Pac. 809, 4 W. C. L. J. 192.

44. Ackerson v. National Zinc Co., 96 Kans. 781, 153 Pac. 530; Muenzen-Mayer v. Hood, 97 Kan. 565, 155 Pac. 917.

Act, filed with the Industrial Accident Board, obviates the necessity for, and deprives the parties of the right to, an arbitration.[45]

A failure to appeal from a decision of the arbitration committee will automatically make their decision the decision of the Industrial Board.[46]

An arbitrator was not rendered ineligible, under a rule promulgated by the compensation board excluding persons, financially interested in the outcome of a case, from being arbitrators, because he had acted as attorney for claimant several weeks after the arbitration had ended.[47]

Where the employee writes to his employer stating that he wishes to negotiate for a settlement and arbitrate the matter if a settlement cannot be reached, requesting that the matter be taken up with his attorney, it amounts to a consent on his part to arbitrate, and a failure on the part of the employer to respond for over two months may be regarded as a refusal to arbitrate, authorizing the bringing of an action by the workman without a request to the judge of the District Court to appoint an arbitrator. A subsequent offer on the part of the employer to arbitrate will not defeat the right of action, and when suit is brought the claimant is entitled to have his cause heard by a jury.[48]

If The Committee of Arbitration appointed under the Illinois Workmen's Compensation Act cannot agree and so reports to the Industrial Board, it is the duty of the Board to refer the matter back and require a final report from the committee.[49]

Where there is evidence before the arbitrator to pass upon, it is his duty to hear and decide such questions of fact as are controverted.[50]

45. Curtis v. Slater Const. Co., 194 Mich. 259, 160, N. W. 659, 16 N. C. C. A. 815.

46. Bloomington D. & C. R. Co. v. Indus. Bd., 114 N. E. 511, 276 Ill. 120.

47. Dewey v. Dewey Fuel Co., — Mich. —, (1920), 178 N. W. 36, 6 W. C. L. J. 330.

48. Southern v. Western States Portland Cement Co., 194 Pac. 636, — Kan. —, (1921).

49. Kerens-Donnewald Coal Co. v. Indus. Bd., 227 Ill. 35.

50. Plass v. Cent. N. E. Ry. Co., 117 N. E. (N. Y.) 952.

Where the employer selected an arbitrator and joined in the arbitration, paid money under the award and complied with other provisions of the award, it waived its defenses against the validity of the claim.[51]

Where the statute provides for an appeal from the arbitrators decision to the Industrial Board or Commission, an appeal will not lie to the courts in the absence of an appeal to the Board or Commission.[52]

51. Brown v. Geo. A. Fuller Co., — Mich. —, 159 N. W. 376.

52. Victor Chemical Works v. Indus. Bd., 113 N. E. 173, 274 Ill. 11; Aurora Brewing Co. v. Indus. Bd., 277 Ill. 142, 150; Schrewe v. N. Y. Cent. R. Co., — Mich. —, 158 N. W. 337; Stacks v. Indus. Comm., — Colo. —, 174 Pac. 588.

CHAPTER XIII.

COMMUTATION OF AWARD

Sec.
504. General.
505. Sufficiency of Evidence to Warrant Lump Sum Award.
506. Consent of Parties.

§ 504. **General.**—The principle involved in the compensation acts, is that the benefits received, are a substitute for the wages of the injured employee, and with this theory in mind the legislatures of all states, except three,[53] have provided for periodical payments. The purpose of this method of payment is to preclude any possibility of an imprudent employee or dependent wasting the means provided for his support and thereby becoming a burden upon society. Fraternal insurance statistics show that more than fifty per cent of the insurance money paid to widows and orphans reaches the hands of swindlers. Our legislatures were, however, mindful of the fact that cases might arise wherein the interests of the individual as well as the community would be better served by the award of a lump sum, and made provisions for such cases by commutation of the weekly payments on their present worth value.[54]

This practise of commuting payments to a lump sum, if unrestricted, would also result in great abuses and injustices. The disabled workmen's hope of obtaining a large amount of money

53. Alaska, Porto Rico, Wyoming.
54. Pinkney v. Erie R. Co., — Pa. —, 109 Atl. 700, 5 W. C. L. J. 892.

at one time often would be an incentive to sacrifice rights to additional benefits to which he might be entitlel. Most acts, therefore, provide that lump sum settlements must be approved by the commission or the court and be for the best interests of the beneficiaries, and must not work an undue hardship or injustice upon the employer, and give the administrative body considerable latitude in determining the necessity and justice of such award. There is the further safeguard of a time limit, before which, in many states, no claim for commutation will be entertained. Some states require that both parties agree to a lump sum settlement, while others authorize the commission to determine for itself the wisdom of such a course.

In an Illinois case a deceased employee left a mother and sister to whose support he in part contributed. An aunt owned a $1000 interest in the mother's $5000 home. The mother also owed the aunt $500. The sister managed the home and kept boarders. In discussing the question of commutation of the award in this case the court said:

"If it be admitted that the stipulation was sufficient to give the board authority to consider $1,920 as the determined compensation payable to Millie Moore (the mother), then the first question presented is whether the evidence shows it to be to the best interest of the parties that this compensation be paid as a lump sum. In Forschner & Co. v. Industrial Board, 278 Ill. 99, 115 N. E. 912, we said:

"'This could only be made to appear by some showing, in a competent and legal manner, of reasons why the prayer of the petition should be granted. * * * To authorize the board to grant the prayer of the petition the petitioner is required to support his application to have the award commuted to a lump sum by competent and legal evidence that it is for the best interests of the parties that the award be paid in a lump sum.'

"In Goelitz Co. v. Industrial Board, 278 Ill. 164, 115 N. E. 855, we said:

'We do not think that it is necessary to show it to be for the best interests of both parties before the award can be made in a lump sum, but we are of the opinion that there should be some

showing by evidence, or by the facts stipulated by counsel for both parties, that it is for the best interests of the party applying for it that the compensation be paid in a lump sum. We do not think the board is authorized to proceed on this point, more than on any other, on mere conjecture, surmise, or speculation, or to assume anything. The order for payment in a lump sum should not be made unless there is some evidence from which it can be reasonably presumed that such lump payment will be for the best interests of the party applying therefor, all things considered and that such order for the payment in a lump sum will not result injuriously to the other party.'

"The evidence here shows Millie Moore to be 87 years of age and in very poor health. She is practically helpless, and cannot walk without assistance, and then only with great difficulty. She is very forgetful, and has not for many years attended to her own business. It is contended that the payments of $4.62 a week are not sufficient to keep her, but this contention is without much force, when it is considered this is equivalent to half of the wages earned by deceased, and according to the evidence is more than he contributed to her support during his lifetime. It is further shown from a consideration of the evidence that this is not the reason assigned for wanting the compensation paid in a lump sum. The petition requesting the commutation to a lump sum assigns as the reason improvements to the property and payment of debts. Practically all of the testimony shows that this money is wanted for the purpose of paying debts amounting to less than $500, owing largely to Jennie Moore. The evidence further shows that Millie Moore has $500 in money on hand which she could use to pay these debts. It is not the purpose of the Compensation Law to provide funds for the benefit of the creditors of the beneficiaries of the deceased. The fundamental basis of workmen's compensation law is that there is a large element of public interest in accidents occurring from modern industrial conditions, and that the economic loss caused by such accidents shall not necessarily rest upon the public, but that the industry in which the accident occurred shall pay, in the first instance, for the accident. That lump sum payments, with proper safeguards,

should be permitted is obvious, but on the other hand the state is concerned in preventing dissipation of the money paid and an early recourse to that charitable aid which systematic compensation aims to avoid. There is nothing to insure that the incapacitated workman or the widow will not lose or squander the sum handed over as compensation for the accident and eventually become as dependent on poor-law relief as if the community had provided nothing at all. As a matter of fact there are always among the paupers in industrial districts thousands of such cases, and their number increases annually. Goelitz & Co., v. Industrial Board, supra. While we think a fair consideration of the evidence shows that it is not for the best interests of this aged beneficiary that this money be paid to her in a lump sum to be used by her relatives in paying obligations due them from her, still we realize that that question is one peculiarly within the province of the Industrial Board, and one to be determined by it under proper rules."[55] The award was set aside because in excess of the probable future payments.

In a Pennsylvania case in which the court refused to commute the payments for the widow without the joinder of a guardian for the children acting under the authority of the court, the court said: "The Compensation Act (Act June 2, 1915 (P. L. 736) contemplates the payment of a percentage of the wages that an employee had received at intervals corresponding to the time at which he would have received his wages had he not been injured. Commutation is the exception to the rule, for the reason that lump sum payments are often quickly dissipated, and do not afford the regular relief so necessary to the widow and orphans. Commutation is only permitted when it appears that the best interests of the employee and his dependents are to be served, and when it will avoid undue hardship. Undoubtedly, in cases of death, the primary thought of the Legislature was the care of the minor children, who might otherwise be destitute, and the surviving widows. In the award of compensation, chil-

55. H. W. Clark v. Indus. Comm., 291 Ill. 5, 126 N. E. 579, (1920), 5 W. C. L. J. 805; Lauritzen v. Lerry & Lench Co. Inc., 184 N. Y. S. 683, 7 W. C. L. J. 110, (1920).

dren receive first consideration, and to give full effect to the humane purposes of the act, their interests must always be carefully guarded. While the compensation payable at stated intervals is given to the widow this does not vest in her the absolute right to squander the money and deprive the children of the support intended by the law, as the state, acting through one of its designated agencies, will, when called upon, see that the fund is properly applied. It is therefore an incorrect statement to say she can refuse to spend the money for care and maintenance of the children, and leave them without such attention. The act gives to the children such an interest in the compensation as can be laid hold of by the courts, and its ultimate disposition controlled; particularly is this so when such compensation assumes the shape of a commuted payment and the widow receives in one sum all payments for 300 weeks."[56]

Where the injuries of the claimant may have resulted in total disability followed by partial disability, the claim is not of a nature wherein compensation should be commuted, under the Delaware Act and the board will deny or postpone any application for commutation, even though both parties are willing to have the claim commuted.[57]

"The Industrial Commission, by the provisions of section 3145 of the Utah act, under special circumstances, when deemed advisable, may commute the periodical payments to one or more lump sum payments. Considering the object sought to be accomplished by the enactment, that it is not damages as ordinarily understood to be paid by the negligent employer for an injury to an employee, but that it is compensation to protect the injured party and those dependent upon him regardless of the question of negligence, and that the state is an interested party, then it must necessarily follow that the authority and discretion of

56. Lovasz v. Carnegie Steel Co., 266 Pa. 84, (1920), 109 Atl. 601, 5 W. C. L. J. 902.

57. Deemer Steel Casting Co. v. Frank, (Dec., 1919), —Del.—, 108 Atl. 283, 5 W. C. L. J. 170.

the commission, as the authorized agent of the state, in determining whether the interests of the parties concerned in any particular case would be best subserved by a commutation or payment in a lump sum, must be absolute, and not subject to review by the courts. In other words, the question for determination is one of discretion under all the peculiar circumstances of the particular case, and must be so considered, and each case determined upon the particular facts surrounding it. It is not a question, as pointed out by the Attorney General, of evidence or the weight of evidence. It must be assumed that the commission, in making the original award, familiarized itself with the facts surrounding the applicant, his particular needs and, based upon such facts, made its decision that the payments should be made periodically as authorized by the act.

"In addition, under the particular facts as presented by the record, even if we considered it a matter that the court should review, we are not prepared to say that the acts of the commission were arbitrary and unlawful. It appears from the record that the injured employee is an Italian, that he is mentally incapacitated by the accident, and that it is wholly uncertain as to how long the incompetency will last, or what form or degree such incompetence or insanity may take. While it is true that the duty of the commission is to protect the injured as well as the state, it is also true that it is incumbent upon the commission to see that no employer shall be imposed upon or required to make payment to an injured employee for any greater length of time than such injury may continue. From the evidence, it was impossible for the commission to tell or determine for what length of time the injury might continue. The injured employee was 35 years of age at the time of the accident, and it is possible that he may in a very short time recover from the effects of the injury and be able to earn a livelihood and to continue the employment in which he was engaged at the time of the accident. If such proves to be the case, it would be manifestly unjust that the employer should continue to make payments, or should at this time pay an

amount greater than would be the total of the periodical payments."[58]

Where a carpenter was permanently incapacitated for work in his trade, but might be able to do clerical work or other work where he could remain seated, and it was further shown that he had incurred medical and hospital expenses to the amount of $900, which were secured by his father mortgaging his farm, it was held that there was sufficient grounds for commuting the award. The court said: "There appears to be very little necessity for construing this statute (Michigan Act). In plain, unmistakable terms it provides for a lump sum agreement by the parties with the approval of the Industrial Accident Board, and it also provides that the board may, at any time, in any case, provide for a commutation of deferred payments, if its discretion is moved by special circumstances attending the case. While the first provision makes it plain that the consent of the employer is to be given, there is no language in the second provision from which any such conclusion could be drawn."[59]

Where an injured employee sues an indemnity company in which the employer is insured, in the absence of an agreement between the parties, he is entitled to a lump sum for the payments which have accrued up to the date of the award, and weekly payments thereafter. The Texas statute makes the payment of an award in a lump sum in case of death or total disability conditional upon an agreement between the injured employee and the employer.[60]

Under the Kansas Workman's Compensation act an arbitrator has no authority to make an award in a lump sum.[61] But where

58. Reteuna v. Indus. Comm., —Utah—, (1919), 185 Pac. 535, 5 W. C. L. J. 327; Stephenson v. Indus. Comm., —Okla.—, (1920), 192 Pac. 580, 6 W. C. L. J. 711.

59. McMullen v. Gavette Const. Co., 207 Mich. 586, (1919), 175 N. W. 120, 5 W. C. L. J. 270.

60. United States Fidelity & Guaranty Co. v. Parker, — Tex. Civ. App. (1919), 217 S. W. 195, 5 W. C. L. J. 468; Texas Employers' Ins. Ass'n v. Pierce, —Tex. Civ. App.—, (1921), 230 S. W. 872.

61. Roper v. Hammer, —Kan.—, (1920), 187 Pac. 858, 5 W. C.L. J. 690; Boyd v. Mining Co., 105 Kan. 551, 185 Pac. 9.

the injured workman is obliged to institute suit to recover compensation, and does so, the court has jurisdiction to render judgment for the immediate payment of the full amount to which he is found to be entitled.[62]

The Texas Act, provides: "In cases where death or total permanent incapacity results from an injury, the liability of the association may be redeemed by payment of a lump sum by agreement of the parties thereto, subject to the approval of the Industrial Accident Board hereinafter created. This section shall be construed as excluding any other character of lump sum settlement save and except as herein specified; provided, however, that in special cases where, in the judgment of the board, manifest hardship and injustice would otherwise result, the board may compel the association in the cases provided for in this section to redeem their liability by payment of a lump sum as may be determined by the board." So, where a lump-sum settlement would enable the injured servant to live upon his unimproved farm, and he could not support his family in town upon the weekly allowance, these are facts properly to be considered in determining whether a lump sum should be awarded.[63]

In interpreting the Nebraska provisions on this subject, the court said: "In the light of all of the legislation on this subject, the discretion of the district court in passing on applications for commutation seems to be invoked only where both parties have agreed to such a course. This construction is not refuted by the exception in the following provision:

'The amount of compensation payable periodically under the law, by agreement of the parties with the approval of the compensation commissioner, may be commuted to one or more lump-sum payments, except compensation due for death and perma-

62. Southern v. Western States Portland Cement Co., —Kan.—, 194 Pac. 636, (1921).

63. Texas Employers' Ins. Ass'n v. Downing, —Tex. Civ. App.—, (1920), 218 S. W. 112, 5 W. C. L. J. 582.

nent disability, which may be commuted only upon the order or decision of the district court.'

"The latter clause, in connection with the entire act, does not necessarily mean that the district court, in absence of an agreement for commutation, may order payment in a lump sum to compensate a dependent for the death or for the permanent disability of the employee. Other provisions have a different import.

"In the district court the procedure for commutation and payment in a lump sum in case of death or of permanent disability applies alone to agreements or settlements. A method of procedure in absence of a mutual understanding of the parties is not found in the statute."[64]

Under statutory provisions allowing commutation of an award when the best interests of the injured employee requires payment in a lump sum, it was held that in the case of a bed-ridden patient, for whom a surgical operation is necessary for the preservation of life, that is such an unusual circumstance as would justify the commutation of the award to enable the patient to pay the surgical expenses, despite the fact that the statute provides that an award will not be commuted to allow the injured employee to satisfy a debt or to make payment to physicians, lawyers, or any other persons.[65]

An employer who denies liability and refuses to pay compensation until he is adjudged liable in a proceeding conducted under the provision of the Illinois act, is not in a position to take advantage of a lump sum, since this right is available only to an employer who pays voluntarily.[66]

In construing the Colorado Act the Supreme Court of that state said: "In view of the foregoing observations, there is no

64. Myers v. Armour & Co., 103 Neb. 407, (1919), 172 N. W. 45, 4 W. C. L. J. 112; Perry v. W. L. Huffman Automobile Co., — Neb. —, (1920), 179 N. W. 501, 6 W. C. L. J. 704.

65. Jensen v. F. W. Woolworth Co., 92 N. J. L. 529, (1919), 106 Atl. 808, 4 W. C. L. J. 421.

66. G. H. Hammond Co. v. Indus. Comm., 288 Ill. 262, (1919), 123 N. E. 384, 4 W. C. L. J. 176.

reason for concluding that the Legislature intended to exclude from the provisions of section 57 cases of permanent total disability, unless such intention appears from the language used, and it is plain that it does not so appear.

"Counsel for defendants in error contend that section 57 is not applicable to cases of permanent total disability, because the number of future partial payments cannot be ascertained. The argument is based upon the following clause in section 57:

"When payment in gross is ordered, the commission shall fix the gross amount to be paid based on the present worth of partial payments.'

"The result of this clause is that the commission can easily and accurately ascertain the amount of the gross payment in cases where the period during which partial payments are to be paid is fixed at a certain definite number of weeks. There is nothing in the clause, however, which prohibits or prevents the Industrial Commission from fixing a gross amount in cases where the periodical payments are to continue during the life of the injured employee. It is true that the exact number of such partial payments in the future, in such cases, cannot be ascertained. Nevertheless, the commission, in the light of all the facts before it in a given case, may make a reasonable estimate as to the probable number of such partial payments, and the probable duration of the claimant's life. The statute by necessary implication empowers the commission to do this and to determine the present worth of partial payments, whether the exact number of such payments can be ascertained or not. To hold otherwise would be to interpolate into section 57, exception which is not there, and to exclude from the operation of that section cases where the injury has produced permanent total disability. An exception not made by the Legislature cannot be read into the statute. 36 Cyc. 1113, note 88. It is not necessary upon the review to determine in what manner the commission may proceed in fixing the gross amount in cases of this kind, and on this subject no opinion is expressed."[67]

67. Karoly v. Indus. Comm. of Colo., 65 Colo. 239, 176 Pac. 284, 3 W. C. L. J. 98.

"The theory of the Legislature manifestly was that cases would arise in which the condition of the employee would be so marked that there would be little reason to anticipate improvement in earning capacity, and that the circumstances would be such as would warrant the court in giving judgment for a lump sum available at once rather than for periodical payments, as in an award."[68]

"Where injured workmen are compelled to resort to judicial proceedings to secure compensation, they may be awarded a lump sum judgment, and, secondly, that in the discretion of the trial court the decree may provide for periodical and terminable payments.

"The judgment in the action, if in favor of the plaintiff, shall be for a lump sum equal to the amount of the payments then due and prospectively due under the act, * * * or, in the discretion of the trial judge, for periodical payments as in an award. Section 5930, Gen. Stat. Kansas 1915.

"See Cain v. Zinc Co., 94 Kan. 679, 146 Pac. 1165, 148 Pac. 251; Roberts v. Packing Co., 95 Kan. 723, 149 Pac. 413; McCracken v. Bridge Co., 96 Kan. 353, 150 Pac. 832, Ann. Cas. 1918B, 689; Id., 96 Kan. 799, 153 Pac. 525, Ann. Cas. 1918B, 689; Halverhout v. Milling Co., 97 Kan. 484, 155 Pac. 916.

"Since the statute gave the injured workman a right to a lump-sum judgment, and merely added a grant of discretionary power to the court to modify that right, a failure to exercise a discretionary power which the trial court might or might not care to use does not ordinarily amount to abuse of discretion."[69]

An award to a mother is only payable during dependency and cannot be commuted to a lump sum. The court said: "In Adams v. New York, Ontario & Western R. R. Co., 175 App. Div. 714, 161 N. Y. Supp. 919, and 220 N. Y. 579, 114 N. E. 1046, it was held that the commission could not commute future payments directed to be made to a widow during widowhood. After that

68. Roberts v. Packing Co., 95 Kan. 723, 149 Pac. 413.

69. Raffeghelle v. Russell, 103 Kans. 849, 176 Pac. 640, 3 W. C. L. J. 293.

decision it was provided, by chapter 705 of the New York Laws of 1917, that commutations under section 27 shall be upon the basis of the Survivorship Annuitants' Table of Mortality and the Remarriage Tables of the Dutch Royal Insurance Institution. That amendment was intended to permit the commutation of an award payable to a widow during widowhood, and to fix a basis for such commutation. But that basis would not apply to an award during dependency. Neither would a life table furnish any basis for such commutation.

"It is evident that the commission treated the award in this case as one payable during life, but by subdivision 4 of section 16 of the Workmen's Compensation Law it continues only during dependency. The commission cannot determine that such an award is of value equal to a life award and compute it on that basis. The appeal, therefore, is governed by the Adams Case."[70]

An agrement of an employer made in 1914, under which, as a condition of being allowed to carry its own insurance, it was necessary to pay, when required, the present value of future payments under an award, does not apply to the award to a widow, for the reason that at the time the agreement was made the New York Act did not comprehend the commutation of awards to widows, and refusal to pay the lump sum award made by the commission was not sufficient grounds for cancellation of the employers privilege of self-insurance.[71]

In a case arising under the Ohio Act in 1914, it was held: "In cases arising by way of appeal from the decision of the Industrial Commission denying the right of a claimant to participate in the state insurance fund, a jury is without power to return a verdict fixing compensation to be paid in lump sum, but such award is subject to the provisions of section 1465-86, in respect to the continuing jurisdiction of the board of awards, and is subject to such modification and change as in the opinion of the

70. Biley v. Columbian Rope Co., 184 App. Div. 718, 172 N. Y. S. 566, 3 W. C. L. J. 176. For New York commutation tables, see pages 1341 to 1350.

71. State Indus. Comm. v. Yonkers R. Co., 186 App. Div. 192, 173 N. Y. S. 858, 3 W. C. L. J. 512.

board may be justified, and such board may, in cases of special circumstances, and when the same is deemed advisable, and not otherwise, commute the periodical benefits found to be due the claimant by the jury to one or more lump sum payments."[72]

Under the Kansas act, it was held that where under an order of the court which provided that, if the defendant did not comply with the provisions as to weekly payments the entire amount would become due and payable at once and execution should then issue therefor, it was not error for the court, having authority to render a judgment for weekly payments, to provide for enforcement of that judgment as it did.[73]

"Section 17 of the New York Act provided that compensation to aliens not residents (or about to become nonresidents of the United States or Canada) should be the same in amount as provided for residents, except that the Commission might at its option, or upon the application of the insurance carrier, should, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installment of compensation as determined by the Commission.

"The evident purpose of the provisions of section 25, regulating the times of payment of compensation, was not only for the convenience of the employee and defendents, by requiring the payments to be in general made with the usual frequency of the payments of wages, but also to guard against the liability of unfortunate or improvident employees or dependents becoming charges upon public charity. As to nonresident alien dependents, or aliens about to become nonresidents, the latter danger did not exist; hence the propriety of the provisions of section 17, providing for the making of commuted payments. After the claimant had determined to remain a resident of this country, neither she nor the appellants had longer any right to insist upon the payment of the commuted award which she had obtained

72. Roma v. Indus. Comm., 97 Ohio 247, 2 W. C. L. J. 122, 119 N. E. 461.

73. Lombard v. Uhrich, 102 Kans. 780, 172 Pac. 32, 2 W. C. L. J. 53.

upon the application of the insurance carrier and under the representation that she was about to return to Italy and reside there. At the time the Commission rescinded the award no payment had been made thereon, nor any appeal taken therefrom, nor had the rights of any third party intervened, so far as appears. The payment of the award in a lump sum would not only have been most unwise, but the Commission was fully justified as a matter of law in rescinding the award. Section 74 of the Workmen's Compensation Law provided that the power and jurisdiction of the Commission over each case should be continuing, and that the Commission might from time to time make such modification or change with respect to former findings or orders relating thereto as in its opinion might be just. The broad powers given to the Commission by this section were in keeping with the general scope of the law, and were ample we think to justify the Commission in rescinding an award which had been procured under an error of fact for which the Commission was in no way responsible."[74]

Where a claimant petitioned for a lump sum in order that she would be enabled to preserve real estate in a tenantable condition, the court allowed such commutation over the contention of defendant that the petitioner had not shown that it was for the best interests of both claimant and defendant. The court held that it was not incumbent upon the claimant to show that it was for the best interest of both parties, but defendant could have opposed it if injured thereby.[75] Where the industrial board has determined that a lump-sum payment was for the best interest of both parties its discretion is not subject to review except as to errors of law, and a showing of abuse of discretion must be made to justify a reversal.[76]

74. Spaduccino v. John G. Hayes & Co., 180 App. Div. 37, 167 N. Y. S. 483, 1 W. C. L. J. 223

75. Schwarm v. Geo. Thompson & Sons Co., 281 Ill. 486, 118 N. E. 95, 1 W. C. L. J. 533; Forschner & Co. v. Indus. Bd., 278 Ill. 99, 115 N. E. 912, 14 N. C. C. A. 348.

76. Schwarm v. Geo. Thompson & Sons Co., 281 Ill. 486, 118 N.E. 95, 1 W. C. L. 533; Gilmore v. Monarch Cement Co., 103 Kan. 336, 173 Pac.

A lump-sum award to a destitute mother cannot be said to be an abuse of discretion by the trial court.[77]

Under the Kansas Act § 5927 "an employer who has made payments for a period of six months may obtain redemption from liability and a complete release and discharge from any further liability on account of the injury by paying eighty per cent of the payments which may become due under the award."[78]

Where the court has awarded a lump sum there can be no reduction upon its payment, for, having determined that the judgment should be rendered in a lump sum, it became the duty of the court to render judgment for the amount due without any discounts or reductions.[79]

Where a workman entered into an agreement with his employer to accept a lump sum in lieu of all weekly payments for injuries he received on or about the time he met with his injury, and the agreement was approved by the industrial board, it was held, on appeal, that the agreement was binding, even though blindness due to the injury developed six months later, and was unknown at the time of the settlement.[80]

Under the Ohio Act, an award vests in the dependent at the time it is made, and in case of his death his personal representative is entitled to the unpaid balance. However, on mandamus to compel the payment to the representative, the court is without power to require the commission to commute the balance due, to a lump sum, as this matter is purely discretionary with the commission.[81]

913, 2 W. C. L. J. 628; Gorrell v. Battelle, 93 Kan. 370, 144 Pac. 244, 14 N. C. C. A. 351; McCorkle v. Red Star Mill & Elevator Co., 99 Kan. 131, 160 Pac. 983, 14 N. C. C. A. 351; Girten v. National Zinc Co., 98 Kan. 405, 158 Pac. 33, 14 N. C. C. A. 351; Ackerson v. National Zinc Co., 96 Kan. 781, 153 Pac. 530.

77. McCracken v. Missouri Valley Bridge & Iron Co., 96 Kan. 353, 150 Pac. 832, 14 N. C. C. A. 351.

78. Roberts v. Charles Wolff Packing Co., 95 Kan. 723, 149 Pac. 413.

79. Roberts v. Charles Wolff Packing Co., 95 Kan. 723, 149 Pac. 413, 14 N. C. C. A. 353.

80. In re McCarthy, 226 Mass. 444, 115 N. E. 764, 14 N. C. C. A. 346.

81. State ex rel. Munding, 92 Ohio St. 434, 13 N. C. C. A. 713, 111 N. E. 299.

Where the commission made an award in accordance with the provisions of the New York compensation act of periodical payments, it was contended that the commission made some recitals which tended to show "that there was an award of $861 44 and that of this amount the sum of $693.19 was due at the time of making the award." The court held that there was no power vested in that body to make such an award, but under some circumstances the award might be commuted. After reciting the applicable portion of section 27 of the Act, the court said further: "That is, the insurance carrier is permitted to pay the present value of all unpaid sums into the state treasury and to be relieved of his further obligation, where it is 'possible to compute the present value of all future payments with due regard for life contingencies,' which means, of course, a calculation based upon the probabilities of life, as fixed by recognized tables, and an adjustment of the present value of such award."[82]

A settlement for a lump sum in a smaller amount than that awarded by the arbitrator, made without the approval of the Industrial Commission is void under the Illinois Act, sections 9 and 23.

But an employer is entitled to credit for payments of installments made under the act as they accrued up to the time of the final determination by the Industrial Commission, but is not entitled to credit for payments beyond the amount so paid under an illegal lump-sum settlement. However, if an employer has entered into an agreement for a lump-sum settlement in good faith, and such agreement is void, such fact may be shown on petition to the Industrial Commission, and considered in determining whether a settlement should be authorized and what the amount should be.[83]

Under the Indiana Act which provides for commutation to a lump sum in unusual cases after 26 weekly installments of compensation have been paid, the commission has no power to com-

82. In Wozneak v. Buffalo Gas Co., 175 App. Div. 286, 161 N. Y. S. 675. 14 N. C. C. A. 346.

83. International Coal & Mining Co. v. Indus. Comm., —Ill.—, (1920), 127 N. E. 703, 6 W. C. L. J. 278.

mute an award after the installments for 26 weeks have been paid, where the case presented no unusual features.[84]

In a compensation proceeding to vacate an award, the district court may award a lump sum, even though this question was not brought up before the Industrial Board, since the board is not a court but an administrative agency, and a resort to the district court in Texas does not amount to an appeal but is a trial de novo. The awarding of a lump sum being descretionary with the court it did not abuse that discretion, where it awarded a lump sum to a destitute mother with seven small children.[85]

An employee may, under the Texas Act, mature his entire claim and bring suit thereon, as well, where there has been no payment on the award, as where, after a payment there has been default, and authorizing an attorney to file suit for the whole amount is a sufficient maturing on his part.[86]

It is held under the Massachusetts Act that where an employee lost part of his hand and he is of age his weekly compensation payments cannot be redeemed by payment of a lump sum, except after they have been continued for not less than six months and the parties agree thereto and the Industrial Accident Board determines that it is for the best interest of the employee.[87]

Under the Texas Act, the justice courts are without jurisdiction to award a lump sum where the amount involved exceeds the jurisdictional amount, and under the general jurisdiction of the courts of the state they have no power to decree lump-sum settlements; therefore an award in a lump sum by a justice court, without the approval of the Industrial Accident Board, is void.[88]

The granting of a lump sum must be governed by the law

84. In re Beggs, —Ind. App.—, 117 N.E. 215, A 1 W. C. L. J. 484.

85. Lumberman's Reciprocal Ass'n v. Behnken, —Tex. Civ. App.—, (1920), 226 S. W. 154, 7 W. C. L. J. 363.

86. U. S. F. & G. Co. v. Parsons, —Tex. Civ. App.—, (1920), 226 S. W. 419.

87. Jakutis' Case, —Mass.—, 130 N. E. 637, (1921).

88. Employers' Indem. Corp. v. Woods, —Tex. Civ. App.—, (1921), 230 S. W. 461.

as it existed at the time of the injury, and not by the law as amended after the injury.[89]

The provision in the Wisconsin Act that, "at any time after 6 months have elapsed from the date of the injury, the commission may order payment in gross or in such manner as it may determine to be for the best interests of the parties," applies only to compensation paid to the injured workman during life, and in case of death the commission has the power to award payment in a lump sum at any time after death has occurred.[90]

Under the New Jersey Act in commuting compensation to a lump sum, where the petitioner's disability is partial in character and permanent in quality, the amount must be determined, in the absence of a specific provision in the schedule, by the relation borne by the disability to those produced by the injuries named in the schedule, and the judgment must show the sum payable periodically and the method by which the result was reached, also the reasons for commuting the award.[91]

In commuting an award, allowance is to be made for the difference in value between the lump sum to be presently paid and the value of the weekly payments to be made thereafter.[92]

When a petition for commutation is filed, notice must be given to the opposite party,[93] and the petitioner must in all cases prove his case by competent and legal evidence produced before the board.[94]

Under the Illinois Act a lump sum award must be the present worth of the sum to which the petitioner would be entitled under the law.[95]

89. Baur v. Ct. of Common Pleas Essex Co., 88 N. J. L. 128, 95 Atl. 627, 14 N. C. C.A. 353.

90. Nelson v. Dahlemberg, Dane Co. Civ. Ct., Wis., Dane County circuit court, 14 N. C. C. A. 354.

91. Mockett v. Ashton,—N. J. L.—, 90 Atl. 127, 4 N. C. C. A. 862; Long v. Bergen County Ct. of Com. Pleas,—N. J. L.—, 86 Atl. 529.

92. James A. Banister Co. v. Kriger,—N. J. L.—, 89 Atl. 923, 4. N. C. C. A. 862.

93. Kettles v. People, 221 Ill. 221.

94. T. J. Forschner & Co. v. Indus. Bd.,—Ill.—, 115 N. E. 912, A. 1 W. C. L. J. 387.

95. Staley v. Ill. Cent. R. Co., 186 Ill. 593, 109 N. E. 342.

In a New Jersey case an award was made to an injured employee for 200 weeks with leave to apply within one year for a further determination of the extent of disability. This sum was commuted and upon the second hearing a disability award for 400 weeks was allowed to the employee, to begin at once. It was held that the second award should not be payable until the expiration of 200 weeks from the date of the first injury, despite the fact that the first award was commuted.[96]

Awards which are personal and therefore do not survive the death of the employee will not be commuted, such as a specific award for the loss of an eye.[97] Nor is an award to a widow a proper case for commutation, since the contingency of remarriage would defeat further payments.[98] But as previously noted the New York Act has been amended in this regard, Chapter 705 New York Laws of 1917.

An administratrix of her deceased husband brought an action in New York for the minimum lump sum provided for in a death case under the New Jersey act, where her husband was employed and killed, and it was held that since the New Jersey act provided for the court of common pleas of New Jersey to determine whether or not a lump sum should be allowed, and, such court not having so determined, an action could not be successfully maintained in the New York courts to recover such lump sum.[99]

"The Texas Compensation Act does not specifically vest in a court trying such a case as this the power given to the Industrial Accident Board by section 15, pt. 1, to approve any agreed lump sum settlement, nor the power given that board by section 12d to review, terminate, diminish, or increase an award of compensation previously made, but we are of the opinion that the court is, by implication, vested with such power, in view of the provision of section 5, pt. 2, p. 283, of the act, to the effect that, 'whenever such a suit is brought, the rights and liability of the

96. Diskon v. Bubb, 88 N. J. L. 513, 96 Atl. 660.

97. Wozneak v. Buffalo Gas Co., 168 App. Div. 268, 161 N. L. S. 675.

98. Adams v. N. Y. Ontario & Western Ry. Co., 220 N. Y. 579, 114 N. E. 1046, Affg. 175 App. Div. 714, 161 Supp. 919.

99. McCarthy v. McAllister Steamboat Co., 94 Misc. 692, 158 Supp. 563.

parties thereto shall be determined by the provisions of this act." We do not think that it was the intention of the Legislature to vest in the Industrial Accident Board the power to review a judgment rendered by a court of competent jurisdiction of the issues involved in a suit like the present one in violation of the general rule that, where a court once acquires jurisdiction over a controversy, it retains such jurisdiction for all purposes necessary to a final determination of the rights of the parties."[1]

Where an insurer fails to comply with an award of the Industrial Board, the injured employee is entitled to an award in a lump sum for the compensation already due and judgment for weekly installments during the balance of the compensation period; and such judgment is a final judgment from which an appeal may be taken.[2]

As to lump-sum settlements under the Federal Act, Sec. 14 of the act provides: "That in cases of death or of permanent total or permanent partial disability, if the monthly payment to the beneficiary is less than $5 a month, or if the beneficiary is or is about to become a nonresident of the United States, or if the commission determines that it is for the best interests of the beneficiary, the liability of the United States for compensaton to such beneficiary may be discharged by the payment of a lump sum equal to the present value of all future payments of compensation computed at four per centum true discount compounded annually. The probability of the beneficiary's death before the expiration of the period during which he is entitled to compensation shall be determined according to the American Experience Table of Mortality; but in case of compensation to the widow or widower of the deceased employee, such lump sum shall not exceed sixty months' compensation. The probability of the happening of any other contingency affecting the amount or duration of the compensation shall be disregarded."

1. U. S. Fidelity & Guar. Co. v. Davis,—Tex. Civ. App.—, (1919). 212 S. W. 239, 4 W. C. L. J. 310.

2. U. S. F. & Co. v. Parsons, — Tex. Civ. App. —, (1920), 226 S. W. 419.

§ 505. **Sufficiency of Evidence to Warrant Lump Sum Award.** Where a board made an award of a lump sum on the statements of counsel alone as to the necessity and advisability of so doing, the court, in holding that the attorney's statement was not sufficient to base the award in a lump sum, said: "We do not think that it is necessary to show it to be for the best interests of both parties before the award can be made in a lump sum; but we are of the opinion that there should be some showing by evidence or by the facts stipulated by counsel for both parties, that it is for the best interests of the party applying for it that the compensation be paid in a lump sum. We do not think the board is authorized to proceed on this point, more than on any other, on mere conjecture, surmise, or speculation or to assume anything. The order for payment in a lump sum should not be made, unless there is some evidence from which it can be reasonably presumed that such lump sum payment will be for the best interests of the party applying therefor, all things considered, and that such order for a lump sum will not result injuriously to the other party."[3]

In determining the necessity for an award of a lump sum, the trial, judge should base his opinion on specific findings of fact which could be reviewed by a court of review, and not make an award on his own opinion contrary to evidence.[4]

The court, in a Texas case, in holding that there was sufficient evidence to warrant the awarding of a lump sum, said: "It was shown by undisputed testimony that at the time of George Durham's death he had purchased some lots, upon which he was making periodical payments; that he owed grocery bills, clothing bills, and other amounts; that after his death his wife was in bad health and was forced to support herself, her widowed mother, who was 55 years of age, and her grandmother, 89 years of age, and earn her living by cooking; that in addition to these expenses she was forced to pay out of her wages as a cook her

3. Goelitz, Co. v. Indus. Bd., 278 Ill. 164, 115 N. E. 855, 1 A. W. C. L. J. 394, 14 N. C. C. A. 347.

4. New York Shipbuilding Co. v. Buchanan, 84 N. J. L. 543, 87 Atl. 86, 14 N. C. C. A. 348.

house rent; that she was without means to pay her debts, and after the death of her husband had lost one of her lots by her inability to make the periodical payments of purchase money; that something more than $200 was still due on the two lots left to her. She testified that as soon as she could get the money she intended to build her a house on one of the lots, and thereby save house rent. We think this evidence is sufficient to warrant the court in granting her a recovery in a lump sum. Texas Employers' Insurance Association v. Downing, 218 S. W. 112."[5]

Where claimant for a lump sum award had a wife and eight minor children dependent upon him, with no property or income, and was unable to perform manual labor, and it was shown that he had earned $350.00 per month prior to the injury, and since the injury had drawn $60.00 per month and was penniless and in debt fifteen months after the accident, a refusal to award a lump sum to enable him to purchase a farm was not an abuse of discretion.[6]

Where a judgment for a lump sum had been awarded to an injured employee and defendant filed a motion within the statutory period to enjoin the enforcement of the judgment, because the plaintiff's total incapacity had ceased, in that he had invested in a cleaning establishment and through his supervision of the work was receiving an income of $12 to $15 per week, the court, in refusing the application, said: "The return on any capital he may have, although augmented by his personal attention in looking after the business in which it is invested, clearly is not an element to be considered in the administration of the compensation act. A judgment based on a finding that a workman's injury has resulted in his total disability to work cannot be said to be inequitable or against conscience because he has the thrift and intelligence to provide for his support by investing such means as he has in a business carried on by the labor of others under his discretion."[7]

5. Hartford Acc. & Idem. Co. v. Durham, — Tex. Civ. App.—, (1920), 222 S. W. 275, 6 W. C. L. J. 395.

6. Kokotovich v. Indus. Comm., —Colo.—, (1921), 195 Pac. 646.

7. Moore v. Peet Bros. Mfg. Co., 99 Kan. 443, 162 Pac. 295, 14 N. C. C. A. 352.

Where the only beneficiary of an employee, who was killed in his employment, was a woman 58 years old and in ill health, a lump-sum settlement was held to be improper, as the dependent might not outlive the period of time when the employer was obligated to make payments in installments under the Illinois Act.[8]

Where an injured employee's wife and family were in Italy, and he desired to return there because he was unable to secure remunerative employment in his weakened physical condition, it was held that this was a proper case for the board to allow commutation.[9] But where a widow desired to return to Russia during the war, commutation was refused, as it was considered that she was better off in this country.[10] But the mere fact that the compensation awarded will be inadequate to support the workman and his family, will not justify commuting the award, especially where it appears the workman is still able to earn something.[11]

A request for commutation in order to allow the injured employee to purchase a cigar, fruit and candy store will not be granted, where it is shown that he has no knowledge of the business or its value, but is depending entirely upon information received from others.[12]

§ 506. **Consent of Parties.**—In Minnesota the consent of the parties is a prerequisite to the commutation of an award to a lump sum in all cases, and that is all that is required in cases that are not serious, but in cases of more serious injury the agreement is ineffectual unless the court gives its consent, finding a lump sum to be for the best interest of the workman.[13]

The Nebraska Act makes provision for commutation either by agreement of the parties or by decision of the court, except com-

8. Matecny v. Vierling Steel Wks., 187 Ill. App. 448, 13 N. C. C. A. 715.

9. Panacona v. Vulcanite Portland Cemet Co., 37 N. J. L. J. 75; O'Connor v. Babcock & Wilcox Co., 37 N. J. L. J. 275.

10. Vitovich v. Empire Steel & Wire Co., 38 N. J. L. J. 315.

11. O'Connor v. Babcock & Wilcox Co., 37 N. J. L. J. 275.

12. Dikovich v. American Steel & Wire Co., 36 N. J. L. J. 304.

13. State ex rel. Anseth v. District Court of Koochiching Co., 134 Minn. 16, 158 N. W. 713, 14 N. C. C. A. 349.

pensation for "death or permanent disability," and that "these may be commuted only with the consent of the district court" following an agreement of the parties within the period of 6 months from the date of the injury. The present value of all future installments computed at 5 per cent. simple interest is the true basis for the adjustment of the payment.[14]

In the absence of an agreement between the parties the court has in the instances above mentioned no authority to order a payment in a lump sum under the Nebraska Act.[15]

Where the statute provides for commutation of an award after 6 months have elapsed, and the condition of the applicant is such as to warrant a present finding of the extent of disability, the parties may under the Wisconsin Act waive the time when a determination may be reached and have the sum commuted at once.[16]

14. Bailey v. U. S. Fidelity & Guaranty Co., 99 Neb. 109, 155 N. W. 237, 14 N. C. C. A. 349.

15. Pierce v. Boyer-Van Kuran Lbr. & Coal Co., 99 Neb. 321, 156 N. W. 509, 14 N. C. C. A. 350; Johansen v. Union Stockyards Co., 99 Neb. 328, 156 N. W. 511, 14 N. C. C. A. 351.

16. McDonald v. Indus. Comm., 165 Wis. 372, 162 N. W. 345, 14 N. C. C. A. 351.

TABLES.

PRESENT WORTH TABLES.

To find the present worth of any sum payable weekly, multiply that sum by the present value of $1 payable for the number of weeks for which such sum is payable.

Example: To find the present worth of $9.32 payable at the end of each week for 100 weeks, multiply $9.32 by the present value of $1 payable weekly for 204 weeks (shown in the tables to be $100.95689). $9.32×$100.95689=$904.92 present worth.

Present worth at 3%, compounded annually of $1 per week, payable at the end of each week, for any term from one week up to 8 years, may be determined by the tables set out on pages 1321 to 1323, both inclusive.

Term—Weeks	0 Years	1 Year and — Weeks	2 Years and —Weeks
1	0.9994	52.1947	101.8989
2	1.9983	53.1645	102.8405
3	2.9966	54.1337	103.7814
4	3.9943	55.1024	104.7219
5	4.9915	56.0705	105.6618
6	5.9881	57.0381	106.6012
7	6.9841	58.0051	107.5401
8	7.9796	58.9716	108.4784
9	8.9745	59.9375	109.4162
10	9.9688	60.9029	110.3534
11	10.9626	61.8677	111.2901
12	11.9558	62.8320	112.2263
13	12.9484	63.7957	113.1620
14	13.9405	64.7589	114.0971
15	14.9320	65.7215	115.0317
16	15.9229	66.6836	115.9658
17	16.9133	67.6451	116.8993
18	17.9031	68.6061	117.8323
19	18.8924	69.5666	118.7648
20	19.8811	70.5265	119.6967
21	20.8692	71.4858	120.6281
22	21.8568	72.4446	121.5590
23	22.8438	73.4029	122.4894
24	23.8303	74.3606	123.4192
25	24.8161	75.3178	124.3485
26	25.8015	76.2744	125.2772
27	26.7862	77.2305	126.2055
28	27.7705	78.1860	127.1332
29	28.7541	79.1410	128.0604
30	29.7372	80.0955	128.9870
31	30.7197	81.0494	129.9132
32	31.7017	82.0028	130.8388
33	32.6831	82.9556	131.7638
34	33.6640	83.9079	132.6884
35	34.6443	84.8596	133.6124
36	35.6240	85.8109	134.5359
37	36.6032	86.7615	135.4589
38	37.5818	87.7116	136.3814
39	38.5596	88.6612	137.3033
40	39.5374	89.6103	138.2247
41	40.5144	90.5588	139.1456
42	41.4908	91.5068	140.0659
43	42.4667	92.4542	140.9858
44	43.4420	93.4011	141.9051
45	44.4167	94.3474	142.8239
46	45.3909	95.2933	143.7421
47	46.3645	96.2385	144.6599
48	47.3376	97.1833	145.5771
49	48.3101	98.1275	146.4938
50	49.2821	99.0711	147.4100
51	50.2536	100.0143	148.3257
52	51.2244	100.9569	149.2408
	1 Year	2 Years	3 Years

Present worth at 3%, compounded annually, of $1.00 per week, payable at the end of each week, for any term from one week up to 8 years

Term—Weeks	3 Years and — Weeks	4 Years and — Weeks	5 Years and — Weeks
1	150.1554	197.0064	242.4928
2	151.0695	197.8939	243.3544
3	151.9831	198.7808	244.2155
4	152.8962	199.6673	245.0762
5	153.8087	200.5533	245.9364
6	154.7207	201.4387	246.7960
7	155.6323	202.3237	247.6552
8	156.5432	203.2082	248.5139
9	157.4537	204.0921	249.3721
10	158.3637	204.9756	250.2298
11	159.2731	205.8585	251.0871
12	160.1820	206.7410	251.9438
13	161.0904	207.6229	252.8001
14	161.9983	208.5043	253.6558
15	162.9057	209.3853	254.5111
16	163.8125	210.2657	255.3659
17	164.7189	211.1457	256.2202
18	165.6247	212.0251	257.0741
19	166.5300	212.9041	257.9274
20	167.4348	213.7825	258.7803
21	168.3391	214.6605	259.6326
22	169.2429	215.5379	260.4845
23	170.1461	216.4148	261.3359
24	171.0489	217.2913	262.1868
25	171.9511	218.1672	263.0373
26	172.8528	219.0427	263.8872
27	173.7540	219.9176	264.7367
28	174.6547	220.7921	265.5857
29	175.5549	221.6661	266.4342
30	176.4546	222.5395	267.2822
31	177.3537	223.4125	268.1298
32	178.2524	224.2850	268.9768
33	179.1505	225.1569	269.8234
34	180.0481	226.0284	270.6695
35	180.9452	226.8994	271.5151
36	181.8418	227.7699	272.3603
37	182.7379	228.6399	273.2049
38	183.6335	229.5094	274.0491
39	184.5286	230.3784	274.8928
40	185.4232	231.2469	275.7360
41	186.3172	232.1149	276.5787
42	187.2108	232.9825	277.4210
43	188.1038	233.8495	278.2628
44	188.9964	234.7160	279.1041
45	189.8884	235.5821	279.9449
46	190.7799	236.4476	280.7852
47	191.6709	237.3127	281.6251
48	192.5614	238.1773	282.4645
49	193.4514	239.0414	283.3034
50	194.3409	239.9049	284.1419
51	195.2299	240.7680	284.9798
52	196.1184	241.6307	285.8173
	4 Years	5 Years	6 Years

Present worth at 3%, compounded annually, of $1.00 per week, payable at the end of each week, for any term from one week up to 8 years

Term—Weeks	6 Years and — Weeks	7 Years and — Weeks
1	286.6543	329.5296
2	287.4908	330.3417
3	288.3269	331.1534
4	289.1625	331.9647
5	289.9976	332.7755
6	290.8322	333.5858
7	291.6664	334.3957
8	292.5001	335.2051
9	293.3333	336.0140
10	294.1660	336.8225
11	294.9983	337.6305
12	295.8301	338.4381
13	296.6614	339.2452
14	297.4922	340.0518
15	298.3226	340.8580
16	299.1525	341.6637
17	299.9819	342.4690
18	300.8109	343.2738
19	301.6394	344.0782
20	302.4674	344.8821
21	303.2949	345.6855
22	304.1220	346.4885
23	304.9486	347.2911
24	305.7748	348.0931
25	306.6004	348.8947
26	307.4256	349.6959
27	308.2504	350.4966
28	309.0746	351.2969
29	309.8984	352.0967
30	310.7217	352.8960
31	311.5446	353.6949
32	312.3670	354.4933
33	313.1889	355.2913
34	314.0103	356.0888
35	314.8313	356.8859
36	315.6519	357.6825
37	316.4719	358.4787
38	317.2915	359.2744
39	318.1106	360.0697
40	318.9293	360.8645
41	319.7475	361.6589
42	320.5652	362.4528
43	321.3825	363.2462
44	322.1993	364.0392
45	323.0156	364.8318
46	323.8315	365.6239
47	324.6469	366.4156
48	325.4618	367.2068
49	326.2763	367.9975
50	327.0903	368.7878
51	327.9039	369.5777
52	328.7169	370.3671
	7 Years	8 Years

Present worth at 3%, compounded annually, of $1.00 semi-monthly, payable at the end of each half month, for any term from one-half month up to eight years
(For method of computation, see example given under weekly table, *ante*, p. 1320.)

Term— Half-Months	0 Years	1 Year and — Months	2 Years and — Months
½	.9978	24.6020	47.5272
1	1.9962	25.5705	48.4676
1½	2.9925	26.5378	49.4068
2	3.9875	27.5040	50.3450
2½	4.9812	28.4690	51.2821
3	5.9738	29.4329	52.2172
3½	6.9651	30.3956	53.1520
4	7.9552	31.3571	54.0858
4½	8.9441	32.3175	55.0186
5	9.9317	33.2767	55.9502
5½	10.9182	34.2348	56.8807
6	11.9034	35.1917	57.8102
6½	12.8874	36.1475	58.7385
7	13.8702	37.1022	59.6658
7½	14.8517	38.0557	60.5921
8	15.8321	39.0081	61.5172
8½	16.8113	39.9593	62.4413
9	17.7893	40.9094	63.3643
9½	18.7661	41.8584	64.2863
10	19.7417	42.8063	65.2071
10½	20.7161	43.7530	66.1270
11	21.6894	44.6986	67.0457
11½	22.6614	45.6431	67.9635
	23.6323	46.5857	68.8786
	1 Year	2 Years	3 Years

Present worth at 3%, compounded annually, of $1.00 semi-monthly, payable at the end of each half month, for any term from one-half month up to eight years

Term—Half-months	3 Years and —Months	4 Years and —Months	5 Years and —Months
½	69.7927	91.4194	112.4242
1	70.7058	92.3060	113.2850
1½	71.6178	93.1915	114.1449
2	72.5288	94.0761	115.0038
2½	73.4388	94.9597	115.8619
3	74.3477	95.8423	116.7190
3½	75.2556	96.7240	117.5752
4	76.1624	97.6047	118.4305
4½	77.0683	98.4844	119.2848
5	77.9731	99.3631	120.1383
5½	78.8769	100.2409	120.9908
6	79.7796	101.1177	121.8425
6½	80.6814	101.9936	122.6932
7	81.5821	102.8685	123.5430
7½	82.4818	103.7424	124.3920
8	83.3806	104.6154	125.2400
8½	84.2783	105.4875	126.0871
9	85.1750	106.3585	126.9334
9½	86.0706	107.2287	127.7787
10	86.9653	108.0979	128.6231
10½	87.8590	108.9661	129.4667
11	88.7517	109.8334	130.3094
11½	89.6434	110.6998	131.1512
	90.5319	111.5625	131.9887
	4 Years	5 Years	6 Years

Present worth at 3%, compounded annually, of $1.00 semi-monthly, payable at the end of each half month, for any term from one-half month up to eight years

Term— Half-Months	6 Years and — Months	7 Years and — Months
½	132.8254	152.6394
1	133.6611	153.4509
1½	134.4961	154.2616
2	135.3301	155.0714
2½	136.1633	155.8805
3	136.9956	156.6887
3½	137.8270	157.4961
4	138.6576	158.3027
4½	139.4873	159.1085
5	140.3162	159.9134
5½	141.1442	160.7176
6	141.9713	161.5210
6½	142.7976	162.3235
7	143.6231	163.1252
7½	144.4477	163.9262
8	145.2714	164.7263
8½	146.0943	165.5257
9	146.9163	166.3242
9½	147.7375	167.1219
10	148.5579	167.9189
10½	149.3774	168.7150
11	150.1961	169.5104
11½	151.0139	170.3050
	151.8271	171.0944
	7 Years	8 Years

(Compound Interest—4% Per Annum)

Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth
0		45	44.2281	90	86.9806	135	128.3060
1	0.9992	6	45.1940	1	87.9142	6	129.2085
2	1.9977	7	46.1592	2	88.8471	7	130.1103
3	2.9955	8	47.1237	3	89.7794	8	131.0115
4	3.9925	9	48.0874	4	90.7109	9	131.9119
5	4.9887	50	49.0504	95	91.6418	140	132.8117
6	5.9842	1	50.0127	6	92.5719	1	133.7108
7	6.9789	2	50.9742	7	93.5014	2	134.6092
8	7.8729	3	51.9350	8	94.4301	3	135.5070
9	8.9661	4	52.8951	9	95.3581	4	136.4041
10	9.9586	55	53.8545	100	96.2855	145	137.3005
1	10.9503	6	54.8131	1	97.2122	6	138.1962
2	11.9413	7	55.7711	2	98.1381	7	139.0913
3	12.9316	8	56.7283	3	99.0633	8	139.9856
4	13.9211	9	57.6847	4	99.9879	9	140.8794
15	14.9098	60	58.6405	105	100.9118	150	141.7724
6	15.8978	1	59.5955	6	101.8349	1	142.6648
7	16.8851	2	60.5499	7	102.7574	2	143.5564
8	17.8716	3	61.5035	8	103.6792	3	144.4474
9	18.8574	4	62.4563	9	104.6002	4	145.3378
20	19.8424	65	63.4085	110	105.5206	155	146.2274
1	20.8267	6	64.3599	1	106.4403	6	147.1164
2	21.8102	7	65.3107	2	107.3593	7	148.0048
3	22.7930	8	66.2607	3	108.2776	8	148.8924
4	23.7751	9	67.2100	4	109.1952	9	149.7794
25	24.7564	70	68.1585	115	110.1122	160	150.6657
6	25.7370	1	69.1064	6	111.0284	1	151.5514
7	26.7168	2	70.0536	7	111.9439	2	152.4363
8	27.6959	3	71.0000	8	112.8588	3	153.3207
9	28.6743	4	71.9457	9	113.7729	4	154.2043
30	29.6519	75	72.8907	120	114.6864	165	155.0873
1	30.6288	6	73.8350	1	115.5992	6	155.9696
2	31.6050	7	74.7786	2	116.5112	7	156.8512
3	32.5804	8	75.7215	3	117.4226	8	157.7322
4	33.5550	9	76.6636	4	118.3334	9	158.6126
35	34.5290	80	77.6051	125	119.2434	170	159.4922
6	35.5022	1	78.5458	6	120.1527	1	160.3712
7	36.4747	2	79.4858	7	121.0614	2	161.2495
8	37.4464	3	80.4252	8	121.9694	3	162.1272
9	38.4174	4	81.3638	9	122.8766	4	163.0042
40	39.3877	85	82.3017	130	123.7832	175	163.8806
1	40.3572	6	83.2389	1	124.6892	6	164.7563
2	41.3261	7	84.1754	2	125.5944	7	165.6313
3	42.2942	8	85.1112	3	126.4989	8	166.5057
4	43.2615	9	86.0462	4	127.4028	9	167.3794

(Compound Interest—4% Per Annum)

Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth
180	168.2524	225	206.8658	270	244.1905	315	280.2698
1	169.1248	6	207.7090	1	245.0056	6	281.0577
2	169.9966	7	208.5517	2	245.8202	7	281.8450
3	170.8676	8	209.3937	3	246.6341	8	282.6317
4	171.7380	9	210.2351	4	247.4474	9	283.4179
185	172.6078	230	211.0758	275	248.2600	320	284.2034
6	173.4769	1	211.9159	6	249.0721	1	284.9884
7	174.3454	2	212.7554	7	249.8836	2	285.7727
8	175.2132	3	213.5942	8	250.6944	3	286.5565
9	176.0803	4	214.4324	9	251.5047	4	287.3397
190	176.9468	235	215.2700	280	252.3143	325	288.1223
1	177.8126	6	216.1069	1	253.1233	6	288.9043
2	178.6778	7	216.9432	2	253.9317	7	289.6857
3	179.5424	8	217.7789	3	254.7395	8	290.4666
4	180.4063	9	218.6139	4	255.5467	9	291.2468
195	181.2695	240	219.4484	285	256.3533	330	292.0265
6	182.1321	1	220.2821	6	257.1593	1	292.8055
7	182.9940	2	221.1158	7	257.9647	2	293.5840
8	183.8553	3	221.9478	8	258.7694	3	294.3619
9	184.7159	4	222.7797	9	259.5736	4	295.1392
200	185.5758	245	223.6110	290	260.3771	335	295.9160
1	186.4352	6	224.4417	1	261.1801	6	296.6921
2	187.2938	7	225.2717	2	261.9824	7	297.4677
3	188.1519	8	226.1011	3	262.7841	8	298.2426
4	189.0093	9	226.9299	4	263.5853	9	299.0170
205	189.8660	250	227.7580	295	264.3858	340	299.7908
6	190.7221	1	228.5856	6	265.1857	1	300.5641
7	191.5775	2	229.4125	7	265.9850	2	301.3367
8	192.4323	3	230.2387	8	266.7837	3	302.1088
9	193.2865	4	231.0644	9	267.5818	4	302.8802
210	194.1400	255	231.8894	300	268.3793	345	303.6511
1	194.9929	6	232.7139	1	269.1762	6	304.4214
2	195.8451	7	233.5377	2	269.9725	7	305.1912
3	196.6967	8	234.3608	3	270.7682	8	305.9603
4	197.5476	9	235.1834	4	271.5633	9	306.7289
215	198.3980	260	236.0053	305	272.3578	350	307.4969
6	199.2476	1	236.8266	6	273.1516	1	308.2643
7	200.0966	2	237.6473	7	273.9449	2	309.0311
8	200.9450	3	238.4674	8	274.7376	3	309.7974
9	201.7928	4	239.2868	9	275.5297	4	310.5630
220	202.6398	265	240.1056	310	276.3212	355	311.3281
1	203.4863	6	240.9238	1	277.1121	6	312.0926
2	204.3321	7	241.7414	2	277.9024	7	312.8566
3	205.1773	8	242.5584	3	278.6921	8	313.6200
4	206.0219	9	243.3748	4	279.4812	9	314.3827

(Compound Interest—4% Per Annum)

Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth
360	315.1450	400	345.1669	440	374.2966	480	402.5605
1	315.9066	1	345.9059	1	375.0136	1	403.2562
2	316.6677	2	346.6444	2	375.7301	2	403.9514
3	317.4282	3	347.3823	3	376.4461	3	404.6461
4	318.1881	4	348.1196	4	377.1615	4	405.3403
365	318.9474	405	348.8564	445	377.8764	485	406.0339
6	319.7062	6	349.5926	6	378.5907	6	406.7270
7	320.4644	7	350.3282	7	379.3045	7	407.4196
8	321.2220	8	351.0633	8	380.0178	8	408.1117
9	321.9791	9	351.7979	9	380.7305	9	408.8032
370	322.7356	410	352.5319	450	381.4427	490	409.4943
1	323.4915	1	353.2653	1	382.1543	1	410.1848
2	324.2468	2	353.9982	2	382.8654	2	410.8747
3	325.0016	3	354.7306	3	383.5760	3	411.5642
4	325.7558	4	355.4624	4	384.2860	4	412.2531
375	326.5094	415	356.1936	455	384.9958	495	412.9416
6	327.2625	6	356.9243	6	385.7045	6	413.6295
7	328.0150	7	357.6544	7	386.4130	7	414.3169
8	328.7669	8	358.3840	8	387.1209	8	415.0037
9	329.5183	9	359.1131	9	387.8282	9	415.6901
380	330.2691	420	359.8416	460	388.5351	500	416.3759
1	331.0194	1	360.5695	1	389.2414	1	417.0612
2	331.7690	2	361.2969	2	389.9472	2	417.7460
3	332.5181	3	362.0237	3	390.6524	3	418.4303
4	333.2667	4	362.7500	4	391.3571	4	419.1141
385	334.0147	425	363.4758	465	392.0613	505	419.7973
6	334.7621	6	364.2010	6	392.7650	6	420.4801
7	335.5089	7	364.9256	7	393.4681	7	421.1623
8	336.2552	8	365.6497	8	394.1707	8	421.8440
9	337.0010	9	366 3733	9	394.8727	9	422.5252
390	337.7461	430	367.0963	470	395.5742	510	423.2059
1	338.4907	1	367.8188	1	396.2752	1	423.8860
2	339.2348	2	368.5407	2	396.9757	2	424.5657
3	339.9782	3	369.2621	3	397.6757	3	425.2448
4	340.7212	4	369.9829	4	398.3751	4	425.9234
395	341.4635	435	370.7032	475	399.0740	515	426.6016
6	342.2053	6	371.4230	6	399.7723	6	427.2792
7	342.9466	7	372.1422	7	400.4702	7	427.9562
8	343.6872	8	372.8608	8	401.1675	8	428.6328
9	344.4274	9	373.5790	9	401.8642	9	429.3089
						520	429.9845

PRESENT WORTH TABLES.

(Compound Interest at 5% Per Annum)

Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth
0		35	34.4170	70	67.7251	105	99. 9600
1	.9991	6	35.3839	1	68.6608	6	100.8656
2	1.9972	7	36.3498	2	69.5957	7	101.7703
3	2.9944	8	37.3149	3	70.5296	8	102.6742
4	3.9907	9	38.2791	4	71.4627	9	103.5772
5	4.9860	40	39.2423	75	72.3950	110	104.4794
6	5.9804	1	40.2047	6	73.3263	1	105.3808
7	6.9739	2	41.1662	7	74.2568	2	106.2813
8	7.9664	3	42.1267	8	75.1864	3	107.1810
9	8.9580	4	43.0864	9	76.1152	4	108.0798
10	9.9487	45	44.0451	80	77.0430	115	108.9778
1	10.9385	6	45.0030	1	77.9700	6	109.8749
2	11.9273	7	45.9600	2	78.8962	7	110.7712
3	12.9152	8	46.9161	3	79.8215	8	111.6667
4	13.9022	9	47.8713	4	80.7459	9	112.5613
15	14.8883	50	48.8256	85	81.6694	120	113.4551
6	15.8734	1	49.7790	6	82.5921	1	114.3480
7	16.8576	2	50.7315	7	83.5139	2	115.2402
8	17.8409	3	51.6831	8	84.4349	3	116.1314
9	18.8233	4	52.6338	9	85.3550	4	117.0219
20	19.8048	55	53.5836	90	86.2742	125	117.9115
1	20.7853	6	54.5326	1	87.1926	6	118.8003
2	21.7649	7	55.4807	2	88.1101	7	119.6883
3	22.7436	8	56.4278	3	89.0269	8	120.5754
4	23.7214	9	57.3741	4	89.9426	9	121.4617
25	24.6983	60	58.3195	95	90.8575	130	122.3471
6	25.6743	1	59.2640	6	91.7716	1	123.2318
7	26.6493	2	60.2077	7	92.6848	2	124.1156
8	27.6235	3	61.1504	8	93.5972	3	124.9986
9	28.5967	4	62.0923	9	94.5087	4	125.8807
30	29.5690	65	63.0333	100	95.4194	135	126.7621
1	30.5404	6	63.9734	1	96.3292	6	127.6426
2	31.5109	7	64.9126	2	97.2382	7	128.5223
3	32.5805	8	65.8510	3	98.1463	8	129.4011
4	33.4492	9	66.7885	4	99.0536	9	130.2792

(Compound Interest at 5% Per Annum)

Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth
140	131.1564	175	161.3476	210	190.5661	245	218.8432
1	132.0328	6	162.1958	1	191.5870	6	219.6376
2	132.9084	7	163.0432	2	192.2070	7	220.4313
3	133.7831	8	163.8897	3	193.0263	8	221.2242
4	134.6571	9	164.7355	4	194.8449	9	222.0163
145	135.5302	180	165.5805	215	194.6626	250	222.8078
6	136.4025	1	166.4247	6	195.4796	1	223.5984
7	137.2740	2	167.2681	7	196.2959	2	224.3884
8	138.1447	3	168.1107	8	197.1114	3	225.1776
9	139.0145	4	168.9526	9	197.9261	4	225.9660
150	139.8836	185	169.7936	220	198.7400	255	226.7538
1	140.7518	6	170.6339	1	199.3532	6	227.5408
2	141.6192	7	171.4734	2	200.3656	7	228.3270
3	142.4858	8	172.3121	3	201.1773	8	229.1125
4	143.3517	9	173.1500	4	201.9882	9	229.8973
155	144.2166	100	173.9871	225	202.7984	260	230.6814
6	145.0808	1	174.8234	6	203.6078	1	231.4647
7	145.9442	2	175.6590	7	204.4164	2	232.2473
8	146.8068	3	176.4938	8	205.2243	3	233.0291
9	147.6685	4	177.3278	9	206.0314	4	233.3102
160	148.5295	195	178.1610	230	206.8378	265	234.5906
1	149.3896	6	178.9934	1	207.6434	6	235.3703
2	150.2490	7	179.8251	2	208.4483	7	236.1492
3	151.1075	8	180.6560	3	209.2524	8	236.9274
4	151.9653	9	181.4861	4	210.0557	9	237.7049
165	152.8222	200	182.5154	235	210.8685	270	238.4817
6	153.6783	1	183.1430	6	211.6602	1	239.2577
7	154.5337	2	183.9717	7	212.4613	2	240.0330
8	155.3882	3	184.7987	8	213.2617	3	240.8075
9	156.2419	4	185.6250	9	214.0613	4	241.5814
170	157.0949	205	186.4504	240	214.8601	275	242.3545
1	157.9470	6	187.2751	1	215.6582	6	243.1269
2	158.7984	7	188.0990	2	216.4556	7	243.8986
3	159.6489	8	188.9222	3	217.2522	8	244.6695
4	160.4987.	9	189.7445	4	218.8481	9	245.4398

(Compound Interest at 5% Per Annum)

Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth
280	246.2093	315	272.6936	350	298.3247	385	323.1299
1	246.9781	6	273.4377	1	299.0447	6	323.8268
2	247.7462	7	274.1810	2	299.7641	7	324.5230
3	248.5135	8	274.9236	3	300.4828	8	325.2185
4	249.2802	9	275.6656	4	301.2008	9	325.9134
285	250.0461	320	276.4068	355	301.9182	390	326.6077
6	250.8113	1	277.1474	6	302.6349	1	327.3013
7	251.5758	2	277.8872	7	303.3509	2	327.9942
8	252.3395	3	278.6264	8	304.0663	3	328.6865
9	353.1026	4	279.3649	9	304.7810	4	329.3782
290	253.8650	325	280.1026	360	305.4950	395	330.0692
1	254.6266	6	280.8397	1	306.2083	6	330.7595
2	255.3875	7	281.5761	2	306.9210	7	331.4493
3	256.1477	8	282.3119	3	307.6330	8	332.1383
4	256.9072	9	283.0469	4	308.3444	9	332.8268
295	257.6660	330	283.7812	365	309.0550	400	333.5145
6	258.4241	1	284.5149	6	309.7650	1	334.2017
7	259.1815	2	285.2478	7	310.4744	2	334.8882
8	259.9381	3	285.9801	8	311.1831	3	335.5740
9	260.6941	4	286.7117	9	311.8911	4	336.2592
300	261.4493	335	287.4426	370	312.5985	405	336.9438
1	262.2039	6	288.1729	1	313.3052	6	337.6278
2	262.9577	7	288.9024	2	314.0112	7	338.3111
3	263.7108	8	289.6313	3	314.7166	8	338.9937
4	264.4633	9	290.3595	4	315.4213	9	339.6757
305	265.2150	340	291.0870	375	316.1254	410	340.3571
6	265.9660	1	291.8138	6	316.8288	1	341.0378
7	266.7163	2	292.5399	7	317.5315	2	341.7179
8	267.4659	3	293.2654	8	318.2336	3	342.3974
9	268.2148	4	293.9902	9	318.9351	4	343.0762
310	268.9631	345	294.7143	380	319.6358	415	343.7544
1	269.7106	6	295.4377	1	320.3360	6	344.4320
2	270.4574	7	296.1605	2	321.0354	7	345.1089
3	271.2035	8	296.8825	3	321.7342	8	345.7852
4	271.9489	9	297.6039	4	322.4324	9	346.4609

(Compound Interest at 5% Per Annum)

Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth
420	347.1359	455	370.3685	490	392.8526	525	414.61
1	347.8103	6	371.0212	1	393.4842	30	417.66
2	348.4841	7	371.6732	2	394.1152	35	420.70
3	349.1572	8	372.3247	3	394.7457	40	423.72
4	349.8298	9	372.9755	4	395.3756	45	426.73
425	350.5016	460	373.6258	495	396.0049	550	429.72
6	351.1729	1	374.2754	6	396.6336	60	435.67
7	351.8435	2	374.9244	7	397.2617	70	441.56
8	352.5135	3	375.5728	8	397.8892	80	447.40
9	353.1829	4	376.2206	9	398.5161	90	453.18
430	353.8516	465	376.8678	500	399.1425	600	458.91
1	354.5197	6	377.5144	1	399.7682	25	473.00
2	355.1872	7	378.1604	2	400.3934	50	486.76
3	355.8541	8	378.8058	3	401.0180	75	500.20
4	356.5204	9	379.4506	4	401.6420	700	513.34
435	357.1860	470	380.0948	505	402.2654	750	538.70
6	357.8510	1	380.7383	6	402.8883	800	562.90
7	358.5154	2	381.3813	7	403.5105	850	586.00
8	359.1791	3	382.0237	8	404.1322	900	608.04
9	359.8423	4	382.6655	9	404.7533	950	629.07
440	360.5048	475	383.3066	510	405.3738	1000	649.14
1	361.1667	6	383.9472	1	405.9937	1100	686.58
2	361.8280	7	384.5872	2	406.6131	1200	720.67
3	362.4886	8	385.2265	3	407.2319	1300	751.71
4	363.1487	9	385.8653	4	407.8501	1400	779.99
445	363.8081	480	386.5035	515	408.4677	1500	805.73
6	364.4669	1	387.1411	6	409.0847	2000	903.81
7	365.1251	2	387.7781	7	409.7012	2500	965.24
8	365.7827	3	388.4145	8	410.3171	3000	1003.72
9	366.4396	4	389.0503	9	410.9324	3500	1027.82
450	367.0960	485	389.6855	520	411.5471	4000	1042.91
1	367.7517	6	390.3201	1	412.1613	5000	1058.29
2	368.4068	7	390.9541	2	412.7749	7500	1067.26
3	369.0613	8	391.5875	4	413.3879	10000	1068.12
4	369.7152	9	392.2203	4	414.0003	*	1068.22

* Perpetuity.

PRESENT WORTH TABLES.

(Compound Interest at 6% Per Annum)

Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth
0		35	34.3057	70	67.2963	105	99.6224
1	.9989	6	35.2663	1	68.2201	6	99.9107
2	1.9967	7	36.2258	2	69.1428	7	100.7981
3	2.9933	8	37.1842	3	70.0645	8	101.6845
4	3.9889	9	38.1416	4	70.9852	9	102.5699
5	4.9833	40	39.0979	75	71.9049	110	103.4543
6	5.9766	1	40.0532	6	72.8235	1	104.3377
7	6.9688	2	41.0073	7	73.7411	2	105.2201
8	7.9599	3	41.9605	8	74.6577	3	106.1016
9	8.9499	4	42.9125	9	75.5732	4	106.9820
10	9.9388	45	43.8635	80	76.4878	115	107.8615
1	10.9266	6	44.8134	1	77.4013	6	108.7400
2	11.9133	7	45.7623	2	78.3138	7	109.6175
3	12.8989	8	46.7101	3	79.2253	8	110.4941
4	13.8834	9	47.6569	4	80.1357	9	111.3696
15	14.8668	50	48.6025	85	81.0452	120	112.2442
6	15.8491	1	49.5472	6	81.9538	1	113.1178
7	16.8302	2	50.4908	7	82.8610	2	113.9904
8	17.8103	3	51.4533	8	83.7674	3	114.8621
9	18.7894	4	52.3748	9	84.6728	4	115.7328
20	19.7673	55	53.3152	90	85.5772	125	116.6025
1	20.7441	6	54.2546	1	86.4805	6	117.4712
2	21.7198	7	55.1929	2	87.3829	7	118.3390
3	22.6945	8	56.1302	3	88.2843	8	119.2058
4	23.6680	9	57.0664	4	89.1846	9	120.0716
25	24.6405	60	58.0016	95	90.0840	130	120.9365
6	25.6119	1	58.9358	6	90.9823	1	121.8004
7	26.5822	2	59.8689	7	91.8796	2	122.6634
8	27.5514	3	60.8009	8	92.7760	3	123.5253
9	28.5195	4	61.7320	9	93.6713	4	124.3863
30	29.4866	65	62.6619	100	94.5656	135	125.2464
1	30.4525	6	63.5909	1	95.4590	6	126.1055
2	31.4174	7	64.5188	2	96.3513	7	126.9636
3	32.3812	8	65.4457	3	97.2427	8	127.8208
4	33.3440	9	66.3715	4	98.1330	9	128.6770

(Compound Interest at 6% Per Annum)

Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth
140	129.5323	175	158.8727	210	187.0885	245	214.2226
1	130.3866	6	159.6943	1	187.8785	6	214.9824
2	131.2400	7	160.5149	2	188.6677	7	215.7413
3	132.0924	8	161.3346	3	189.4560	8	216.4994
4	132.9438	9	162.1535	4	190.2434	9	217.2567
145	133.7943	180	162.9714	215	191.0300	250	218.0131
6	134.6439	1	163.7884	6	191.8157	1	218.7686
7	135.4925	2	164.6044	7	192.6005	2	219.5233
8	136.3401	3	165.4196	8	193.3844	3	220.2772
9	137.1868	4	166.2338	9	194.1674	4	221.0302
150	138.0326	185	167.0472	220	194.9496	255	221.7824
1	138.8774	6	167.8596	1	195.7309	6	222.5338
2	139.7213	7	168.6712	2	196.5113	7	223.2843
3	140.5642	8	169.4819	3	197.2909	8	224.0340
4	141.4062	9	170.2915	4	198.0696	9	224.7828
155	142.2473	190	171.1003	225	198.8474	260	225.5308
6	143.0874	1	171.9082	6	199.6243	1	226.2780
7	143.9266	2	172.7153	7	200.4004	2	227.0243
8	144.7648	3	173.5214	8	201.1756	3	227.7698
9	145.6022	4	174.3266	9	201.9500	4	228.5145
160	146.4385	195	175.1309	230	202.7234	265	229.2583
1	147.2740	6	175.9343	1	203.4961	6	230.0013
2	148.1085	7	176.7368	2	204.2678	7	230.7435
3	148.9421	8	177.5385	3	205.0387	8	231.4848
4	149.7747	9	178.3392	4	205.8087	9	232.2253
165	150.6064	200	179.1390	235	206.5779	270	232.9650
6	151.4372	1	179.9380	6	207.3462	1	233.7039
7	152.2671	2	180.7360	7	208.1137	2	234.4419
8	153.0960	3	181.5332	8	208.8803	3	235.1792
9	153.9240	4	182.3295	9	209.6461	4	235.9155
170	154.7511	205	183.1248	240	210.4109	275	236.6511
1	155.5773	6	183.9193	1	211.1750	6	237.3859
2	156.4025	7	184.7129	2	211.9382	7	238.1198
3	157.2268	8	185.5057	3	212.7005	8	238.8529
4	158.0502	9	186.2975	4	213.4620	9	239.5852

(Compound Interest at 6% Per Annum)

Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth
280	240.3167	315	265.4105	350	289.5424	385	312.7494
1	241.0474	6	266.1132	1	290.2182	6	313.3992
2	241.7772	7	266.8150	2	290.8931	7	314.0483
3	242.5062	8	267.5161	3	291.5673	8	314.6966
4	243.2344	9	268.2164	3	292.2408	9	315.3443
285	243.9619	320	268.9160	355	292.9135	390	315.9912
6	244.6884	1	269.6147	6	293.5855	1	316.6374
7	245.4142	2	270.3127	7	294.2567	2	317.2829
8	246.1392	3	271.0098	8	294.9271	3	317.9276
9	246.8634	4	271.7062	9	295.5968	4	318.5717
290	247.5867	325	272.4019	360	296.2658	395	319.2150
1	248.3093	6	273.0967	1	296.9340	6	319.8576
2	249.0310	7	273.7908	2	297.6015	7	320.4995
3	249.7519	8	274.4841	3	298.2682	8	321.1406
4	250.4721	9	275.1766	4	298.9342	9	321.7811
295	251.1914	330	275.8684	365	299.5994	400	322.4208
6	251.9099	1	276.5594	6	300.2639	1	323.0599
7	252.6276	2	277.2496	7	300.9277	2	323.6982
8	253.3446	3	277.9390	8	301.5907	3	324.3358
9	254.0607	4	278.6277	9	302.2530	4	324.9727
300	254.7760	335	279.3156	370	302.9145	405	325.6088
1	255.4905	6	280.0027	1	303.5753	6	326.2443
2	256.2043	7	280.6891	2	304.2354	7	326.8790
3	256.9172	8	281.3747	3	304.8947	8	327.5131
4	257.6293	9	282.0595	4	305.5533	9	328.1464
305	258.3407	340	282.7436	375	306.2111	410	328.7791
6	259.0512	1	283.4269	6	306.8682	1	329.4110
7	259.7610	2	284.1094	7	307.5246	2	330.0422
8	260.4690	3	284.7912	8	308.1803	3	330.6727
9	261.1781	4	285.4722	9	308.8352	4	331.3025
310	261.8855	345	286.1525	380	309.4894	415	331.9317
1	262.5920	6	286.8320	1	310.1428	6	332.5601
2	263.2978	7	287.5108	2	310.7955	7	333.1878
3	264.0029	8	288.1887	3	311.4475	8	333.8148
4	264.7071	9	288.8660	4	312.0988	9	334.4411

PRESENT WORTH TABLES.

(Compound Interest at 6% Per Annum)

Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth	Weeks	Present Worth
420	335.0667	455	356.5286	490	377.1677	525	397.02
1	335.6916	6	357.1295	1	377.7457	30	399.79
2	336.3158	7	357.7298	2	378.3229	35	402.55
3	336.9393	8	358.3294	3	378.6996	40	405.29
4	337.5621	9	358.9284	4	379.4756	45	408.01
425	338.1843	460	359.5266	495	380.0509	550	410.73
6	338.8507	1	360.1242	6	380.6256	60	416.10
7	339.4264	2	360.7212	7	381.1997	70	421.42
8	340.0463	3	361.3175	8	381.7731	80	426.68
9	340.6658	4	361.9131	9	382.3459	90	431.88
430	341.2845	465	362.5080	500	382.9180	600	437.02
1	341.9025	6	363.1023	1	383.4895	25	449.63
2	342.5197	7	363.6959	2	384.0604	50	461.89
3	343.1363	8	364.2889	3	384.6306	75	473.82
4	343.7322	9	264.8812	4	385.2002	700	485.42
435	344.3674	470	365.4728	505	385.7691	750	507.65
6	344.9820	1	366.0638	6	386.3375	800	528.69
7	345.5958	2	366.6541	7	386.9051	850	548.58
8	346.2090	3	367.2437	8	387.4722	900	567.39
9	346.8214	4	367.8327	9	388.0386	950	585.18
440	347.4332	475	368.4211	510	388.6044	1000	602.00
1	348.0443	6	369.0087	1	389.1695	1100	632.96
2	348.6548	7	369.5958	2	389.7341	1200	660.64
3	349.2645	8	370.1821	3	390.2980	1300	685.40
4	349.8736	9	370.7679	4	390.8612	1400	707.54
445	350.4820	480	371.3529	515	391.4239	1500	727.35
6	351.0897	1	371.9373	6	391.9850	2000	799.06
7	351.6967	2	372.5211	7	392.5473	2500	840.09
8	352.3030	3	373.1042	8	393.1080	3000	863.57
9	352.9087	4	373.6866	9	393.6681	3500	877.00
450	353.5137	485	374.2685	520	394.2276	4000	884.68
1	354.1180	6	374.8496	1	394.7865	5000	891.60
2	354.7217	7	375.4301	2	395.3448	7500	894.75
3	355.3246	8	376.0100	3	395.9024	10000	894.95
4	355.9269	9	376.5802	4	396.4594	*	894.96

* Perpetuity.

HOW TO COMPUTE COMPENSATION.

Daily wage	Times 300 days	Equals yearly wage	Divided by 52 weeks	Equals weekly wage	50% of equals weekly compensation	Divided by 6 equals daily compensation	66 2/3% of equals weekly compensation	Divided by 6 equals daily compensation
1.25	300	375.00	52	7.21	3.60	.60	4.81	.80
1.26	300	378.00	52	7.27	3.63	.60	4.85	.81
1.27	300	381.00	52	7.33	3.66	.61	4.89	.82
1.28	300	384.00	52	7.38	3.69	.61	4.92	.82
1.29	300	387.00	52	7.44	3.72	.62	4.96	.83
1.30	300	390.00	52	7.50	3.75	.62	5.00	.83
1.31	300	393.00	52	7.55	3.77	.63	5.03	.84
1.32	300	396.00	52	7.61	3.80	.63	5.07	.85
1.33	300	399.00	52	7.67	3.83	.64	5.11	.85
1.34	300	402.00	52	7.73	3.86	.64	5.15	.86
1.35	300	405.00	52	7.79	3.89	.65	5.19	.87
1.36	300	408.00	52	7.85	3.92	.65	5.23	.87

Daily wage	Times 300 days	Equals yearly wage	Divided by 52 weeks	Equals weekly wage	50% of equals weekly compensation	Divided by 6 equals daily compensation	66 2/3% of equals weekly compensation	Divided by 6 equals daily compensation
1.37	300	411.00	52	7.90	3.95	.66	5.27	.88
1.38	300	414.00	52	7.96	3.98	.66	5.31	.89
1.39	300	417.00	52	8.02	4.00	.67	5.35	.89
1.40	300	420.00	52	8.07	4.03	.67	5.38	.90
1.41	300	423.00	52	8.13	4.06	.68	5.42	.90
1.42	300	426.00	52	8.19	4.09	.68	5.46	.91
1.43	300	429.00	52	8.25	4.12	.69	5.50	.92
1.44	300	432.00	52	8.30	4.15	.69	5.53	.92
1.45	300	435.00	52	8.36	4.18	.70	5.57	.93
1.46	300	438.00	52	8.42	4.21	.70	5.61	.94
1.47	300	441.00	52	8.48	4.24	.71	5.65	.94
1.48	300	444.00	52	8.54	4.27	.71	5.69	.95
1.49	300	447.00	52	8.59	4.29	.71	5.73	.96
1.50	300	450.00	52	8.65	4.32	.72	5.77	.96
1.51	300	453.00	52	8.71	4.35	.72	5.81	.97
1.52	300	456.00	52	8.77	4.37	.73	5.85	.98
1.53	300	459.00	52	8.82	4.41	.73	5.88	.98
1.54	300	462.00	52	8.88	4.44	.74	5.92	.99
1.55	300	465.00	52	8.94	4.47	.74	5.96	.99
1.56	300	468.00	52	9.00	4.50	.75	6.00	1.00
1.57	300	471.00	52	9.06	4.53	.75	6.04	1.01
1.58	300	474.00	52	9.11	4.55	.76	6.07	1.01
1.59	300	477.00	52	9.17	4.58	.76	6.11	1.02
1.60	300	480.00	52	9.23	4.61	.77	6.15	1.03
1.61	300	483.00	52	9.29	4.64	.77	6.19	1.03
1.62	300	486.00	52	9.35	4.67	.78	6.23	1.04
1.63	300	489.00	52	9.40	4.70	.78	6.27	1.05
1.64	300	492.00	52	9.46	4.73	.79	6.31	1.05
1.65	300	495.00	52	9.52	4.76	.79	6.35	1.06
1.66	300	498.00	52	9.58	4.79	.80	6.39	1.07
1.67	300	501.00	52	9.63	4.81	.80	6.42	1.07
1.68	300	504.00	52	9.69	4.84	.81	6.46	1.08
1.69	300	507.00	52	9.75	4.87	.81	6.50	1.08
1.70	300	510.00	52	9.81	4.90	.82	6.54	1.09
1.71	300	513.00	52	9.86	4.93	.82	6.57	1.10
1.72	300	516.00	52	9.92	4.96	.83	6.61	1.10
1.73	300	519.00	52	9.98	4.99	.83	6.65	1.11
1.74	300	522.00	52	10.04	5.02	.84	6.69	1.12
1.75	300	525.00	52	10.09	5.04	.84	6.73	1.12
1.76	300	528.00	52	10.15	5.07	.84	6.77	1.13
1.77	300	531.00	52	10.21	5.10	.85	6.81	1.14
1.78	300	534.00	52	10.27	5.13	.85	6.85	1.14
1.79	300	537.00	52	10.33	5.16	.86	6.89	1.15
1.80	300	540.00	52	10.38	5.19	.86	6.92	1.15
1.81	300	543.00	52	10.44	5.22	.87	6.96	1.16
1.82	300	546.00	52	10.50	5.25	.87	7.00	1.17
1.83	300	549.00	52	10.56	5.28	.88	7.04	1.17
1.84	300	552.00	52	10.61	5.30	.88	7.07	1.18
1.85	300	555.00	52	10.67	5.33	.89	7.11	1.19
1.86	300	558.00	52	10.73	5.36	.89	7.15	1.19
1.87	300	561.00	52	10.79	5.39	.90	7.19	1.20
1.88	300	564.00	52	10.85	5.42	.90	7.23	1.21
1.89	300	567.00	52	10.90	5.45	.91	7.27	1.21
1.90	300	570.00	52	10.96	5.48	.91	7.31	1.22
1.91	300	573.00	52	11.02	5.51	.92	7.35	1.23

Daily wage	Times 300 days	Equals yearly wage	Divided by 52 weeks	Equals weekly wage	50% of equals weekly compensation	Divided by 6 equals daily compensation	66 2/3% of equals weekly compensation	Divided by 6 equals daily compensation
1.92	300	576.00	52	11.08	5.54	.92	7.39	1.23
1.93	300	579.00	52	11.13	5.56	.93	7.42	1.24
1.94	300	582.00	52	11.19	5.59	.93	7.46	1.24
1.95	300	585.00	52	11.25	5.62	.94	7.50	1.25
1.96	300	588.00	52	11.31	5.65	.94	7.54	1.26
1.97	300	591.00	52	11.36	5.68	.95	7.57	1.26
1.98	300	594.00	52	11.42	5.71	.95	7.61	1.27
1.99	300	597.00	52	11.48	5.74	.96	7.65	1.27
2.00	300	600.00	52	11.54	5.77	.96	7.69	1.28
2.01	300	603.00	52	11.59	5.79	.96	7.73	1.29
2.02	300	606.00	52	11.65	5.82	.97	7.77	1.30
2.03	300	609.00	52	11.71	5.85	.97	7.81	1.30
2.04	300	612.00	52	11.77	5.88	.98	7.85	1.31
2.05	300	615.00	52	11.82	5.91	.98	7.88	1.31
2.06	300	618.00	52	11.88	5.94	.99	7.92	1.32
2.07	300	621.00	52	11.94	5.97	.99	7.96	1.33
2.08	300	624.00	52	12.00	6.00	1.00	8.00	1.33
2.09	300	627.00	52	12.06	6.03	1.00	8.04	1.34
2.10	300	630.00	52	12.11	6.05	1.01	8.07	1.35
2.11	300	633.00	52	12.17	6.08	1.01	8.11	1.35
2.12	300	636.00	52	12.23	6.11	1.02	8.15	1.36
2.13	300	639.00	52	12.29	6.14	1.02	8.19	1.37
2.14	300	642.00	52	12.35	6.17	1.03	8.23	1.37
2.15	300	645.00	52	12.40	6.20	1.03	8.27	1.38
2.16	300	648.00	52	12.46	6.23	1.04	8.31	1.39
2.17	300	651.00	52	12.52	6.26	1.04	8.35	1.39
2.18	300	654.00	52	12.58	6.29	1.05	8.39	1.40
2.19	300	657.00	52	12.63	6.31	1.05	8.42	1.40
2.20	300	660.00	52	12.69	6.34	1.06	8.46	1.41
2.21	300	663.00	52	12.75	6.37	1.06	8.50	1.41
2.22	300	666.00	52	12.81	6.40	1.07	8.54	1.42
2.23	300	669.00	52	12.86	6.43	1.07	8.57	1.43
2.24	300	672.00	52	12.92	6.46	1.08	8.61	1.44
2.25	300	675.00	52	12.98	6.49	1.08	8.65	1.44
2.26	300	678.00	52	13.04	6.52	1.09	8.69	1.45
2.27	300	681.00	52	13.10	6.55	1.09	8.73	1.46
2.28	300	684.00	52	13.15	6.57	1.09	8.77	1.46
2.29	300	687.00	52	13.21	6.60	1.10	8.81	1.47
2.30	300	690.00	52	13.27	6.63	1.10	8.85	1.48
2.31	300	693.00	52	13.33	6.66	1.11	8.89	1.48
2.32	300	696.00	52	13.38	6.69	1.11	8.92	1.49
2.33	300	699.00	52	13.44	6.72	1.12	8.96	1.49
2.34	300	702.00	52	13.50	6.75	1.12	9.00	1.50
2.35	300	705.00	52	13.56	6.78	1.13	9.04	1.51
2.36	300	708.00	52	13.61	6.80	1.13	9.07	1.51
2.37	300	711.00	52	13.67	6.83	1.14	9.11	1.52
2.38	300	714.00	52	13.73	6.86	1.14	9.15	1.53
2.39	300	717.00	52	13.79	6.89	1.15	9.19	1.53
2.40	300	720.00	52	13.85	6.92	1.15	9.23	1.54
2.41	300	723.00	52	13.90	6.95	1.16	9.27	1.55
2.42	300	726.00	52	13.96	6.98	1.16	9.31	1.55
2.43	300	729.00	52	14.02	7.01	1.17	9.35	1.56
2.44	300	732.00	52	14.08	7.04	1.17	9.39	1.57
2.45	300	735.00	52	14.13	7.06	1.18	9.42	1.57
2.46	300	738.00	52	14.19	7.09	1.18	9.46	1.58

Daily wage	Times 300 days	Equals yearly wage	Divided by 52 weeks	Equals weekly wage	50% of equals weekly compensation	Divided by 6 equals daily compensation	66 2/3% of equals weekly compensation	Divided by 6 equals daily compensation
2.47	300	741.00	52	14.25	7.12	1.19	9.50	1.58
2.48	300	744.00	52	14.31	7.15	1.19	9.54	1.59
2.49	300	747.00	52	14.37	7.18	1.20	9.58	1.60
2.50	300	750.00	52	14.42	7.21	1.20	9.61	1.60
2.51	300	753.00	52	14.48	7.24	1.21	9.65	1.61
2.52	300	756.00	52	14.54	7.27	1.21	9.69	1.62
2.53	300	759.00	52	14.60	7.30	1.22	9.73	1.62
2.54	300	762.00	52	14.66	7.33	1.22	9.77	1.63
2.55	300	765.00	52	14.71	7.36	1.23	9.81	1.64
2.56	300	768.00	52	14.77	7.39	1.23	9.81	1.64
2.57	300	771.00	52	14.83	7.42	1.24	9.89	1.65
2.58	300	774.00	52	14.88	7.44	1.24	9.92	1.65
2.59	300	777.00	52	14.94	7.47	1.25	9.96	1.66
2.60	300	780.00	52	15.00	7.50	1.25	10.00	1.67
2.61	300	783.00	52	15.06	7.53	1.26	10.04	1.67
2.62	300	786.00	52	15.12	7.56	1.26	10.08	1.68
2.63	300	789.00	52	15.17	7.59	1.27	10.11	1.69
2.64	300	792.00	52	15.23	7.62	1.27	10.15	1.69
2.65	300	795.00	52	15.29	7.65	1.28	10.19	1.70
2.66	300	798.00	52	15.35	7.68	1.28	10.23	1.71
2.67	300	801.00	52	15.40	7.70	1.28	10.27	1.71
2.68	300	804.00	52	15.46	7.73	1.29	10.32	1.72
2.69	300	807.00	52	15.52	7.76	1.29	10.35	1.73
2.70	300	810.00	52	15.58	7.79	1.30	10.39	1.73
2.71	300	813.00	52	15.63	7.82	1.30	10.42	1.74
2.72	300	816.00	52	15.69	7.85	1.31	10.46	1.74
2.73	300	819.00	52	15.75	7.88	1.31	10.50	1.75
2.74	300	822.00	52	15.81	7.91	1.32	10.54	1.76
2.75	300	825.00	52	15.87	7.94	1.32	10.58	1.76
2.76	300	828.00	52	15.92	7.96	1.33	10.61	1.77
2.77	300	831.00	52	15.98	7.99	1.33	10.65	1.78
2.78	300	834.00	52	16.04	8.02	1.34	10.69	1.78
2.79	300	837.00	52	16.10	8.05	1.34	10.73	1.79
2.80	300	840.00	52	16.15	8.08	1.35	10.77	1.80
2.81	300	843.00	52	16.21	8.11	1.35	10.81	1.80
2.82	300	846.00	52	16.27	8.14	1.36	10.85	1.81
2.83	300	849.00	52	16.33	8.17	1.36	10.89	1.82
2.84	300	852.00	52	16.39	8.20	1.37	10.93	1.82
2.85	300	855.00	52	16.44	8.22	1.37	10.96	1.83
2.86	300	858.00	52	16.50	8.25	1.38	11.00	1.83
2.87	300	861.00	52	16.56	8.28	1.38	11.04	1.84
2.88	300	864.00	52	16.62	8.31	1.39	11.08	1.85
2.89	300	867.00	52	16.67	8.34	1.39	11.11	1.85
2.90	300	870.00	52	16.73	8.37	1.40	11.15	1.86
2.91	300	873.00	52	16.79	8.40	1.40	11.19	1.87
2.92	300	876.00	52	16.85	8.43	1.41	11.23	1.87
2.93	300	879.00	52	16.90	8.45	1.41	11.27	1.88
2.94	300	882.00	52	16.96	8.48	1.41	11.31	1.89
2.95	300	885.00	52	17.02	8.51	1.42	11.35	1.89
2.96	300	888.00	52	17.08	8.54	1.42	11.39	1.90
2.97	300	891.00	52	17.13	8.57	1.43	11.42	1.90
2.98	300	894.00	52	17.19	8.60	1.43	11.46	1.91
2.99	300	897.00	52	17.25	8.63	1.44	11.50	1.92
3.00	300	900.00	52	17.31	8.66	1.44	11.54	1.92

TABLES FOR COMPUTING THE PRESENT VALUE OF COMPENSATION.

By J. H. Woodward, Actuary of The State Fund

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An amendment to section 27 of the Workmen's Compensation Law, to take effect July 1, 1917, specifically legalizes the use for valuation purposes of the Survivorship Annuitants' Table of Mortality, the Remarriage Tables of the Dutch Royal Insurance Institution, and interest at 3½ per centum per annum.

Section 27 applies only to death benefits or other compensation the present value of which is required by the Commission to be paid into the State Fund. Nevertheless the same standards of valuation have been approved by the Commission for commutation of the benefit in cases of lump sum settlements either under section 17, relating to compensation to non-resident aliens, or section 25, governing the manner in which compensation is payable. These standards of valuation are the same as those which have been in use by the Commission since the law went into effect on July 1, 1914, and the only difference between the values provided in the case of lump sum settlements and those required to be deposited under section 27 is that in the latter case a provision is made for a loading to cover the expenses of the trust fund thus created.

The Commission receives numerous inquiries as to the method used in determining the commuted values of benefits, and it is thought advisable to publish in The Bulletin certain tables which will enable the values for the simpler forms of benefit to be computed or checked by any one, no special actuarial knowledge being needed for the purpose. In the case of certain death benefits, the status of dependency is too complicated to permit of any popular method of obtaining values; but even in such cases the accompanying tables will serve to give a rough indication of the correct amounts. In order to make use of the tables as easy as possible, a number of practical illustrations of their application have been given. It is necessary to introduce a certain amount of elementary actuarial notation, but this, it is believed, will not prove a serious obstacle to their use by persons without technical training. Attorneys, claim adjusters, accountants and others interested can easily learn to check commuted values as determined by the Commission in all of the simpler cases.

It must be borne in mind that the values as shown in the tables are *net* values and not applicable to deposits made under section 27 until after an expense loading has been added to the value.

DEATH BENEFITS.

The death benefits (in addition to the funeral benefit) under the New York Workmen's Compensation Law may be briefly stated as follows:

1. To the widow (or dependent husband) 30 per cent of the wages of the deceased employee, until death; upon remarriage, the pension ceases and two years' compensation is paid in one sum.

2. To each child, until it reaches the age of 18, 10 per cent of the wages, the widow being alive, or 15 per cent, the widow being dead.

3. To parents or grandparents, for life, 25 per cent of the deceased's wages.

4. To brothers, sisters or grandchildren, until age 18, 15 per cent of the wages.

NOTE.—The total amount of compensation payable must not exceed 66 2/3 per cent of the deceased's wages, and the maximum wages upon which compensation is payable is $1,200 per annum.

NOTATION.

x = age of widow.

y_1 = age of eldest child, y_2 the next eldest, etc.

z_1 = age of eldest of dependent brothers, sisters or grandchildren, z_2 the next eldest, etc.

w_1 = age of eldest dependent parents or grandparents, w_2 the next eldest, etc.

$\bar{a}_{x'}$, the present value of $1 per annum, payable momently, and ceasing at death or remarriage.

$\acute{E}x''$, the present value of $1 payable at remarriage.

$\bar{a}\overline{y}_{\overline{18-y}|}$, the present value of $1 per annum, payable momently, and ceasing at age 18.

$\bar{a}_{w}$, the present value of $1 per annum, payable momently, and ceasing at death.

Tables I to IV inclusive permit the easy calculation of the commuted values of all death cases where the full benefits provided in the law do not have to be reduced to conform with the provision of the law that the aggregate compensation is in no case to exceed 66 2/3 per cent of the wages of the deceased.

TABLE I

WIDOW OR WIDOWER

Present Value of Compensation per $100 Annual Wages, Payable till Death or Remarriage

$$30\ddot{a}_{x'} + 60\acute{E}_{x''}$$

Age	Present value	Age	Present value
15	260.97	40	481.89
16	266.55	41	483.66
17	272.73	42	484.26
18	279.54	43	483.69
19	286.02	44	482.07
20	294.96	45	479.43
21	303.72	46	475.83
22	313.14	47	471.36
23	323.16	48	466.02
24	333.75	49	459.96
25	344.76	50	453.18
26	356.34	51	445.83
27	368.10	52	437.85
28	380.07	53	429.45
29	392.04	54	420.51
30	403.86	55	411.15
31	415.38	56	401.46
32	426.42	57	391.44
33	436.83	58	381.12
34	446.43	59	370.56
35	455.13	60	359.82
36	462.81	61	348.87
37	469.35	62	337.80
38	474.72	63	326.61
39	478.92	64	315.33
		65	304.02

TABLE II

CHILD, DURING LIFE OF WIDOW

Present Value of Compensation per $100 Annual Wages, Payable until Age 18

$$15\bar{a}_{y\,\overline{18-y}|} - 5\bar{a}_{x:y\,\overline{18-y}|}$$

Age of widow (x)	Age of Child (y)																		Age of widow (x)
	0	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	
15	131.40																		15
16	131.41	126.18																	16
17	131.42	126.18	120.75																17
18	131.44	126.20	120.76	115.12															18
19	131.46	126.22	120.77	115.13	109.28														19
20	131.48	126.24	120.79	115.14	109.29	103.22													20
21	131.49	126.26	120.81	115.16	109.30	103.23	96.92												21
22	131.51	126 26	120.83	115.18	109.32	103.24	96.93	90.40											22
23	131.53	126 29	120.83	115.20	109.34	103.25	96.94	90.41	83.62										23
24	131.56	126.32	120.86	115.21	109.36	103.27	96.95	90.42	83.63	76.59									24
25	131.59	126.34	120.88	115.23	109.36	103.29	96.97	90.43	83.64	76.60	69.27								25
26	131.63	126.37	120.90	115.26	109.38	103.30	96.98	90.44	83.65	76.61	69.27	61.69							26
27	131.67	126.41	120.94	115.29	109.41	103.32	96.98	90.46	83.66	76.62	69.28	61.69	53.82						27
28	131.72	126.45	120.97	115.31	109.43	103.34	97.00	90.46	83.67	76.63	69.29	61.70	53.83	45.66					28
29	131.77	126.49	121.01	115.35	109.46	103.36	97.02	90.48	83.68	76.63	69.30	61.71	53.83	45.67	37.19				29
30	131.82	126.54	121.05	115.39	109.49	103.39	97.04	90.50	83.69	76.63	69.31	61.72	53.83	45.67	37.20	28.41			30
31	131.87	126.59	121.10	115.43	109.53	103.42	97.07	90.52	83.71	76.64	69.32	61.73	53.84	45.68	37.20	28.41	19.29		31
32	131.93	126.66	121.15	115.47	109.57	103.45	97.10	90.54	83.73	76.66	69.32	61.74	53.85	45.68	37.20	28.41	19.29	9.83	32
33	132.01	126.72	121.20	115.51	109.61	103.49	97.13	90.57	83.75	76.68	69.34	61.74	53.86	45.69	37.21	28.41	19.29	9.83	33
34	132.09	126.79	121.27	115.57	109.65	103.53	97.16	90.60	83.77	76.70	69.36	61.76	53.86	45.69	37.21	28.42	19.29	9.83	34
35	132.18	126.87	121.34	115.64	109.71	103.58	97.20	90.63	83.80	76.72	69.37	61.77	53.88	45.70	37.21	28.42	19.29	9.83	35
36	132.29	126.96	121.42	115.71	109.77	103.63	97.24	90.66	83.82	76.74	69.39	61.78	53.88	45.70	37.22	28.42	19.29	9.83	36
37	132.41	127.06	121.50	115.78	109.83	103.68	97.29	90.70	83.86	76.76	69.41	61.80	53.90	45.71	37.23	28.43	19.29	9.83	37
38	132.53	127.17	121.60	115.87	109.91	103.74	97.34	90.74	83.90	76.80	69.43	61.82	53.91	45.72	37.23	28.43	19.29	9.84	38
39	132.70	127.29	121.71	115.96	109.99	103.81	97.40	90.80	83.94	76.82	69.46	61.84	53.92	45.73	37.23	28.43	19.30	9.84	39
40	132.82	127.44	121.82	116.06	110.08	103.88	97.46	90.85	83.98	76.86	69.48	61.86	53.94	45.74	37.24	28.44	19.30	9.84	40
41	133.00	127.57	121.96	116.17	110.17	103.97	97.54	90.90	84.02	76.90	69.52	61.88	53.96	45.75	37.25	28.44	19.30	9.84	41
42	133.17	127.74	122.10	116.30	110.28	104.06	97.62	90.98	84..08	76.94	69.55	61.90	53.98	45.76	37.25	28.44	19.30	9.84	42
43	133.37	127.92	122 26	116.44	110.40	104.16	97.70	91.04	84.14	76.99	69.58	61.93	54.00	45.78	37.27	28.45	19.31	9.84	43
44	133.60	128.12	122.44	116.59	110.53	104.28	97.80	91.12	84.20	77.04	69.63	61.96	54.02	45.80	37.27	28.46	19.31	9.84	44
45	133.83	128.34	122.63	116.77	110.68	104.40	97.90	91.22	84.28	77.10	69.68	62.00	54.04	45.82	37.29	28.46	19.31	9.84	45
46	134.05	128.58	122.85	116.95	110.85	104.54	98.02	91.32	84.36	77.17	69.72	62.04	54.07	45.84	37.30	28.47	19.31	9.84	46
47	134.33	128.86	123.08	117.16	111.03	104.70	98.16	91.42	84.45	77.24	69.78	62.08	54.10	45.86	37.31	28.48	19.31	9.84	47
48	134.57	128.86	123.34	117.39	111.22	104.87	98.30	91.54	84.55	77.32	69.84	62.13	54.14	45.88	37.33	28.49	19.32	9.84	48
49	134.85	129.15	123.34	117.64	111.44	105.06	98.46	91.68	84.66	77.41	69 92	62.18	54.18	45.91	37.35	28.50	19.33	9.84	49
50	135.13	129.48	123.64	117.64	111.69	105.26	98.64	91.82	84.78	77.51	70.00	62.24	54.22	45.94	37.37	28.51	19.33	9.84	50
51		129.83	123.94	117.92	111.69	105.50	98.83	91.99	84.92	77.62	70.08	63.31	54.27	45.97	37.39	28.52	19.33	9.84	51
52			124.30	118.23	111.95	105.50	99.04	92.17	85..06	77.74	70.18	62.38	54.32	46.00	37.41	28.54	19.34	9.84	52
53				118.56	112 24	105.75	99.04	92.37	85.23	77.87	70.28	62.46	54.38	46.04	37.43	28.55	19.35	9.84	53
54					112.57	106.02	99.28	92.37	85.41	78.02	70.40	62.55	54.44	46.10	37.47	28.56	19.35	9.84	54
55						106.33	99.54	92.59	85.41	78.18	70.52	62.65	54.52	46.14	37.50	28.58	19.37	9.85	55
56							99.83	92.83	85.61	78.18	70.66	62.76	54.60	46.20	37.53	28.60	19.37	9.85	56
57								93.10	85 83	78.36	70.66	62.88	54.68	46.26	37.57	28.62	19.38	9.86	57
58									86.08	78 56	70.82	62.88	54.78	46.33	37.61	28.65	19.39	9.86	58
59										78.78	71.00	63.01	54.78	46.40	37.67	28.67	19.41	9.86	59
60											71.18	63.16	54.89	46.40	37.72	28.70	19.42	9.86	60
61												63.32	55.01	46.48	37.72	28.74	19.43	9.86	61
62													55.14	46.58	37.77	28.74	19.45	9.87	62
63														46.68	37.85	28.78	19.45	9.88	63
64															37.91	28.82	19.47	9.88	64
65																28.86	19.49	9.88	65
66																	19.51	9.89	66
67																		9.90	67

ILLUSTRATIONS OF USES OF TABLES.

EXAMPLE 1.—Dependents: widow, aged 37, and children, aged 13, 6 and 1. Annual wage of deceased employee, $720.

The benefit in this case is

$$7.2[(30\bar{a}_{37}' + 60\bar{E}_{37}'') + (15\bar{a}_{\overline{13}|}^{5}) - 5\bar{a}_{37:\overline{13\ 6}|}) + (15\bar{a}_{\overline{6\ 12}|} - 5\bar{a}_{37:\overline{6\ 12}|}) + (15\bar{a}_{\overline{1\ 17}|} - 5\bar{a}_{37:\overline{1\ 17}|})]$$

$$= 7.12 \left[\begin{array}{cccc} \text{Table I} & \text{Table II} & \text{Table II} & \text{Table II} \\ (469.35) & + (45.71) & + (97.29) & + (127.06) \end{array}\right]$$

$= 7.2\ (739.41 = \$5{,}323.75$ Total present value.

EXAMPLE 2.—Dependents: children, aged 15, 12, 7 and 2. Annual wage of deceased employee, $1,050.

The benefit in this case is:

$$10.5\ (15\bar{a}_{\overline{15\ 3}|} + 15\bar{a}_{\overline{12\ 6}|} + 15\bar{a}_{\overline{7\ 11}|} + 15\bar{a}_{\overline{2\ 16}|})$$

From Table III

$= 10.5\ (42.44 + 80.10 + 133.76 + 177.78)$

$= 10.5\ (434.08) = \$4{,}557.84$ Total present value.

EXAMPLE 3.—Dependents: widow, aged 26, child, aged 5, and grandparent, aged 73. Annual wage of deceased employee, $1,130.

The benefit in this case is

$$11.3\ [(30\bar{a}_{26}' + 60\bar{E}_{26}'') + (15\bar{a}_{\overline{5\ 13}|}) - (25\bar{a}_{26:\overline{5\ 13}|} + (25\bar{a}_{7\ 8})]$$

$$= 11.3 \left[\begin{array}{ccc} \text{Table I} & \text{Table II} & \text{Table IV.} \\ (356.34) & + (103.30) & + (178.97) \end{array}\right]$$

$= 11.3\ (567.02 = \$7{,}216.29$ Total present value.

AGE OF ANNUITANT.—In order to secure the correct value it is advisable to ascertain the date of birth of all annuitants and then to take the age at nearest birthday as the age on the date that the present value is desired. For example: If an employee were killed on May 24, 1917, and his widow was born on August 15, 1870, her age must be taken as 47 if it is desired to compute the value as of date of death.

NOTE.—Where the total compensation would otherwise exceed 66 2/3 per cent, a deduction in the value must be made, the principles of which are too complex for treatment in this article.

DISMEMBERMENTS.

Tables V to VII inclusive are for use in computing the present value of cases of dismemberment and permanent total disability.

TABLE V

PRESENT VALUE OF $1 PER ANNUM, PAYABLE MOMENTLY TILL DEATH. SURVIVORSHIP ANNUITANT'S MORTALITY — 3½ PER CENT. INTEREST.

Age	Present value	Age	Present value	Age	Present value
0	23.760	35	19.471	70	8.253
1	23.699	36	19.255	71	7.884
2	23.636	37	19.033	72	7.519
3	23.570	38	18.804	73	7.159
4	23.502	39	18.568	74	6.805
5	23.431	40	18.325	75	6.458
6	23.357	41	18.074	76	6.118
7	23.281	42	17.817	77	5.786
8	23.201	43	17.552	78	5.462
9	23.118	44	17.280	79	5.148
10	23.033	45	17.000	80	4.843
11	22.943	46	16.714	81	4.549
12	22.851	47	16.420	82	4.265
13	22.755	48	16.119	83	3.992
14	22.655	49	15.811	84	3.730
15	22.551	50	15.497	85	3.480
16	22.444	51	15.175	86	3.241
17	22.332	52	14.847	87	3.014
18	22.217	53	14.513	88	2.799
19	22.097	54	14.172	89	2.596
20	21.972	55	13.826	90	2.404
21	21.843	56	13.475	91	2.224
22	21.709	57	13.118	92	2.055
23	21.570	58	12.756	93	1.897
24	21.427	59	12.391	94	1.750
25	21.278	60	12.022	95	1.613
26	21.123	61	11.649	96	1.487
27	20.964	62	11.274	97	1.371
28	20.798	63	10.896	98	1.263
29	20.627	64	10.518	99	1.165
30	20.450	65	10.138	100	1.076
31	20.267	66	9.758	101	.995
32	20.077	67	9.379	102	.922
33	19.882	68	9.002	103	.854
34	19.680	69	8.626	104	.790

TABLE VI.

PRESENT VALUE OF $1 PER ANNUM, PAYABLE MOMENTLY FOR DURATION GIVEN. SURVIVORSHIP ANNUITANTS' MORTALITY — 3½ PER CENT. INTEREST

Age	YEARS					
	1	2	3	4	5	6
15	.98055	1.92295	2.82867	3.69913	4.53568	5.33964
16	.98054	1.92293	2.82862	3.69903	4.53553	5.33941
17	.98054	1.92290	2.82855	3.69892	4.53535	5.33914
18	.98053	1.92286	2.82848	3.69879	4.53514	5.33885
19	.98052	1.92283	2.82841	3.69865	4.53493	5.33854
20	.98051	1.92280	2.82832	3.69849	4.53468	5.33817
21	.98050	1.92275	2.82822	3.69831	4.53439	5.33776
22	.98049	1.92270	2.82811	3.69813	4.53410	5.33733
23	.98048	1.92265	2.82799	3.69791	4.53376	5.33683
24	.98046	1.92259	2.82786	3.69767	4.53338	5.33628
25	.98044	1.92253	2.82771	3.69741	4.53296	5.33568
26	.98043	1.92246	2.82756	3.69712	4.53251	5.33501
27	.98041	1.92237	2.82736	3.69678	4.53197	5.33423
28	.98039	1.92229	2.82716	3.69642	4.53140	5.33341
29	.98036	1.92218	2.82694	3.69601	4.53076	5.33248
30	.98033	1.92207	2.82688	3.69556	4.53005	5.33143
31	.98030	1.92196	2.82641	3.69508	4.52928	5.33031
32	.98027	1.92182	2.82610	3.69451	4.52840	5.32903
33	.98023	1.92167	2.82576	3.69389	4.52742	5.32761
34	.98019	1.92150	2.82537	3.69321	4.52634	5.32604
35	.98014	1.92131	2.82494	3.69245	4.52513	5.32429
36	.98009	1.92110	2.82448	3.69160	4.52381	5.32235
37	.98004	1.92088	2.82396	3.69068	4.52234	5.32021
38	.97997	1.92062	2.82338	3.68963	4.52068	5.31780
39	.97990	1.92033	2.82273	3.68847	4.51886	5.31515
40	.97982	1.92001	2.82201	3.68718	4.51682	5.31219
41	.97973	1.91966	2.82122	3.68575	4.51458	5.30893
42	.97964	1.91927	2.82033	3.68417	4.51208	5.30530
43	.97953	1.91885	2.81935	3.68242	4.50932	5.30128
44	.97941	1.91836	2.81826	3.68046	4.50623	5.29680
45	.97928	1.91783	2.81706	3.67830	4.50282	5.29183
46	.97913	1.91724	2.81571	3.67588	4.49901	5.28632
47	.97897	1.91658	2.81422	3.67320	4.49480	5.28020
48	.97878	1.91584	2.81254	3.67022	4.49011	5.27339
49	.97858	1.91502	2.81071	3.66693	4.48493	5.26589
50	.97835	1 91413	2.80867	3.66328	4.47919	5.25756
51	.97811	1.91313	2.80641	3.65923	4.47282	5.24832
52	.97782	1.91200	2.80387	3.65471	4.46572	5.23805
53	.97752	1.91078	2.80110	3.64974	4.45791	5.22673
54	.97719	1.90941	2.79800	3.64420	4.44922	5.21416
55	.97680	1.90789	2 79456	3.63807	4.43959	5.20024
56	.97638	1.90619	2.79073	3.63125	4.42891	5.18482
57	.97591	1.90431	2.78649	3.62370	4.41709	5.16778
58	.97539	1.90224	2.78182	3.61537	4.40406	5.14898
59	.97482	1 89993	2.77663	3.60613	4.38961	5.12818
60	.97418	1.89737	2.77087	3.59590	4.37364	5.10520
61	.97347	1.89453	2.76449	3.58459	4.35599	5.07986
62	.97268	1.89139	2 75744	3.57208	4.33651	5.05192
63	.97181	1.88791	2.74962	3.55824	4.31499	5.02113
64	.97084	188405	2.74098	3.54295	4.29128	4.98724
65	.96977	1.87977	2.73142	3.52609	4.26516	4.95000
66	.96857	1.87504	2.72086	3.50749	4.23641	4.90909
67	.96725	1.86980	2.70919	3.48699	4.20479	4.86423
68	.96579	1.86401	2.69632	3.46442	4.17007	4.81510
69	.96418	1.85761	2.68212	3.43959	4.13199	4.76138
70	.96238	1.85053	2.66646	3 41229	4.09026	4.70272
71	.96040	1.84271	2.64923	3.38235	4.04464	4.63884
72	.95820	1.83409	2 63027	3.34953	3.99483	4.56938
73	.95578	1.82459	2.60945	3.31362	3.94058	4.49406
74	.95310	1.81412	2 58661	3.27439	3.88157	4.41256
75	.95014	1.80259	2.56156	3.23159	3.81754	4.32462
76	.94687	1.78992	2.53416	3.18502	3.74827	4.23006
77	.94327	1.77600	2.50424	3.13445	3.67353	4.12872
78	.93930	1.76074	2.47161	3.07967	3.59312	4.02048
79	.93493	1.74403	2.43611	3.02050	3.50692	3.90539
80	.93013	1.72575	2.39756	2.95675	3.41484	3.78352

TABLE III

CHILD, THE WIDOW BEING DEAD; BROTHER, SISTER OR GRANDCHILD

Present Value of Compensation per \$100 *Annual Wages, Payable until Age* 18

$15\bar{a}_{\overline{y\ 18-y}|}$

Age	Present value	Age	Present value
0	193.10	10	102.84
1	185.60	11	91.70
2	177.78	12	80.10
3	169.66	13	68.04
4	161.20	14	55.48
5	152.42	15	42.44
6	143.26	16	28.84
7	133.76	17	14.72
8	123.86		
9	113.56		

TABLE IV

PARENT OR GRANDPARENT

Present Value of Compensation per $100 *Annual Wages*

$25\bar{a}_{w}$

Age	Present value	Age	Present Value	Age	Present value	Age	Present val.
0	594.00	30	511.25	60	300.55	90	60.10
1	592.48	31	506.68	61	291.22	91	55.60
2	590.90	32	501.92	62	281.85	92	51.38
3	589.25	33	497.05	63	272.40	93	47.42
4	587.55	34	492.00	64	262.95	94	43.75
5	585.78	35	486.78	65	253.45	95	40.32
6	583.92	36	481.38	66	243.95	96	37.18
7	582.02	37	475.82	67	234.47	97	34.28
8	580.02	38	470.10	68	225.05	98	31.58
9	577.95	39	464.20	69	215.65	99	29.12
10	575.82	40	458.12	70	206.32	100	26.90
11	573.58	41	451.85	71	197.10	101	24.88
12	571.28	42	445.42	72	187.97	102	23.05
13	568.88	43	438.80	73	178.97	103	21.35
14	566.38	44	432.00	74	170.12	104	19.75
15	563.78	45	425.00	75	161.45	105	16.32
16	561.10	46	417.85	76	152.95	106	12.50
17	558.30	47	410.50	77	144.65		
18	555.42	48	402.97	78	136.55		
19	552.42	49	395.27	79	128.70		
20	549.30	50	387.42	80	121.08		
21	546.08	51	379.37	81	113.72		
22	542.72	52	371.17	82	106.62		
23	539.25	53	362.82	83	99.80		
24	535.68	54	354.30	84	93.25		
25	531.95	55	345.65	85	87.00		
26	528.08	56	336.87	86	81.02		
27	524.10	57	327.95	87	75.35		
28	519.95	58	318.90	88	69.98		
29	515.86	59	309.77	89	64.90		

The following examples indicate the manner in which the tables should be used:

EXAMPLE 4.—The injured employee is aged 40 and earned $3 daily. He is entitled to a weekly compensation of $11.54 for life, which amounts to $600.08 annually. Referring to Table V, the present value of $1 at age 40 is $18.325, which should be multiplied by $600.08, the annual award. The product, $10,996.47, is the present value of this case, as of the date of accident. Ten years later, the present value of this case is the product of $600.08 and 15.497 or $9,299.44.

EXAMPLE 5.—In the case of an employee, aged 35, earning $4.50 daily, who lost an arm, the compensation is payable for 312 weeks at $17.31 weekly. The amount of the award paid annually is 52 times $17.31, or $900.12. Referring to Table VI, this last amount should be multiplied by the annuity at age 35 for six years, 5.32429, to secure the present value, $4,792.50.

TABLE VII.

WEEKS EXPRESSED AS A DECIMAL OF A YEAR

Weeks	Decimal	Weeks	Decimal	Weeks	Decimal
1	.01923	21	.40385	41	.78846
2	.03846	22	.42308	42	.80769
3	.05769	23	.44231	43	.82692
4	.07692	24	.46154	44	.84615
5	.09615	25	.48077	45	.86538
6	.11538	26	.50000	46	.88462
7	.13462	27	.51923	47	.90385
8	.15385	28	.53846	48	.92308
9	.17308	29	.55769	49	.94231
10	.19231	30	.57692	50	.96154
11	.21154	31	.59615	51	.98077
12	.23077	32	.61538	52	1.00000
13	.25000	33	.63462		
14	.26923	34	.65385		
15	.28846	35	.67308		
16	.30769	36	.69231		
17	.32692	37	.71154		
18	.34615	38	.73077		
19	.36538	39	.75000		
20	.38462	40	.76923		

EXAMPLE 6.—Take a case where the employee, aged 50, earning $2.50 daily lost the use of a foot; the benefit is 205 weeks, out of which 15 weeks have been paid, and commutation is granted for the balance of 190 weeks at $9.61 weekly. The period of 190 weeks is equal to 3.65385 years. Table VII gives weeks expressed as a decimal of a year. The method of computation follows:

Age 50 — Annuity at fourth year	3.66328
Age 50 — Annuity at third year	2.80867
Difference	.85461
Multiplication by fraction of year	.65385
Product	.55879
Add annuity at third year	2.80867
Annuity at 3.65385 years	3.36746
Multiply by annual award	$ 499.72
Present value of 190 weeks	$1,682.79

Tables V and VI are only applicable to cases where the injured employee has recovered from the shock of injury and is free from any organic disease.

CHAPTER XIV.

EVIDENCE.

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§ 507. **General.**—The intention usually expressed in one form or another in the compensation acts, is to avoid strict and technical rules of procedure in the interest of summary justice. This has also with some uniformity been applied to the rules of evidence. Though it has been held that a compensation proceeding should be governed by legal rules of evidence.[17]

So it was stated generally in an Illinois case: "Without question the burden does so rest upon the claimant to show by competent testimony not only the fact of the injury but that it occurred in connection with the employment of the deceased. (Hills v. Blair, 182 Mich. 20 (7 N. C. C. A. 409); Dragovich v. Iroquois Iron Co., 269 Ill. 478 (10 N. C. C. A. 475).) The burden also rests upon the claimant to furnish evidence from which the inference can be logically drawn that the injury arose out of and in the course of his employment. The proof must be based on something more than a mere guess, conjecture or surmise as to what the cause of the injury was. (Savage v. Aetna Life Ins. Co., (Mass.), 110 N. E. Rep. 283; Woods v. Wilson Sons & Co., W. C. & Ins. Rep. (Eng. 1913) 569.) It cannot be said that the existence of a certain fact may reasonably be inferred from the evidence when the existence of another fact inconsistent with the first can be from the same evidence inferred with equal certainty. A theory cannot be said to be established by circumstantial evidence unless the facts relied on are of such a nature and are so related to each other that it is the only conclusion that can reasonably be drawn from them. (Condon v. Schoenfeld, 214 Ill. 226 (18 Am. Neg. Rep. 671n); Neal v. Chicago, Rock Island

17. Horn v. Arnett, 91 N. J. L. 110, 102 Atl. 366; McGuirt v. Gillespie, — La. —, 75 So. 419, A. 1 W. C. L. J. 702.

and Pacific Railway Co., 129 Iowa 5 (19 Am. Neg. 213, 2 L. R. A. N. S. 905). But the proof of such facts may be made by circumstantial as well as by direct evidence. A greater or less probability leading, on the whole, to a satisfactory conclusion is all that can reasonably be required to establish controverted facts. Devine v. Delano, 272 Ill. 166; Hills v. Blair, supra."[18]

The commissions, boards and courts are however as a general rule much more liberal in the matter of the evidence that is permitted to be introduced than is true under the common-law procedure. It is not however sufficient for experts to testify that the ailment in question might have resulted from the assigned cause, they must at least testify that the result in question most probably came from the cause alleged.[19]

§ 508. **Hearsay.**—The well founded common-law rule excluding hearsay evidence is not followed so strictly in compensation procedure, though the courts will not permit an award to stand which is based on hearsay evidence uncorroborated by facts circumstances or other evidence.[20]

Under the English rule, statements made by the injured employee to another, as to the cause of the injury from which death resulted, are inadmissible.[21]

While there is some conflict among the American decisions upon this point, that may be expected, especially in view of the fact that they are based upon the interpretation of the various acts

18. Ohio Building Safety Vault Co. v. Industrial Board of Illinois, 277 Ill. 96, 115 N. E. 149, 14 N. C. C. A. 224; Vassilakis v. Fairfax Hotel Co. Inc., 184 N. Y. S. 774, (1920), 7 W. C. L. J. 139.

19. Fink v. Sheldon Axle & Spring Co., — Pa. —, 113 Atl. 666, (1921).

20. Belcher v. Carthage Machine Co., 224 N. Y. 326, 120 N. E. 735; Valentisse v. Weaver, — Ky. App. —, (1920), 228 S. W. 1036; Rockfeller v. Indus. Comm., — Utah —, 1921, 197 Pac. 1038; Bresee et al. v. Clark Equipment Co., — Mich. —, 1921, 183 N. W. 19; Blezina v. Castile Mining Co., Mich.— (1920), 178 N. W. 57, 6 W. C. L. J. 327; McHale v. Sheffield Farms Co., 184 N. Y. S. 576, (1920), 7 W. C. L. J. 115.

21. Smith v. Hardman & Holden Ltd., 6 B. W. C. C. 719, 14 N. C. C. A. 431; Shea v. Wilson & Co., Barnsley Ltd., (1916), W. C. & Ins. Rep. 197, 50 Ir. L. T. R. 73, 14 N. C. C. A. 431.

rather than upon the common law. In a New York case the court said: "This section (68) has plainly changed the rule of evidence in all cases affected by the act. It gives the Workmen's Compensation Commission free rein in making its investigations and in conducting its hearings, and authorizes it to receive and consider, not only hearsay testimony, but any kind of evidence that may throw light on a claim pending before it. The award of the commission cannot be overturned on account of any alleged error in receiving evidence. This is all true, but, as I read it, section 68, as applied to this case, does not make the hearsay testimony offered by the claimant sufficient ground to uphold the award which the commission has made. That section does not declare the probative force of any evidence, but it does declare that the aim and end of the investigation by the commission shall be 'to ascertain the substantial rights of the parties.' * * * The act may be taken to mean that while the commission's inquiry is not limited by the common-law or statutory rules of evidence or formal rules of procedure, and it may, in its discretion, accept any evidence that is offered, still in the end there must be a residuum of legal evidence to support the claim before an ward can be made."[22]

In discussing the admissibility of hearsay evidence the Supreme Court of Utah said: "We are of the opinion that for the purpose of determining questions of fact arising under the Industrial Act the commission, in order to arrive at the truth, may pursue any course or method which to it seems best calculated to arrive at the truth, so long as it does not depart from the provisions of the act. The commission may thus have recourse to hearsay evidence if such evidence may lead to some tangible fact which sheds light upon the ultimate question to be determined and found. In that respect it is the duty of the commission to observe and follow the provisions of the act, and if that is done neither this nor any

22. Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, 14 N. C. C. A. 432; Lindquest v. Holler, 178 App. Div. 317, 164 N. Y. Div. —, 185 Supp. 314, 7 W. C. L. J. 347; Larrabee's Case, — Me — , Supp. 906, 14 N. C. C. A. 432; Anthus v. Rail Joint Co., — N. Y. App. (1921), 113 Atl. 268.

other court has the right to interfere with the commission in the method pursued by it in arriving at its conclusions. We, however, agree with the New York Court of Appeals, as expressed in 218 N. Y. 439, 113 N. E. 507, Ann. Cas. 1918B 540 that although the commission in its investigations may have recourse to hearsay evidence to assist it in arriving at the real facts, yet when it makes its findings every finding of fact must be based on some substantial legal and competent evidence. In other words, every material finding that is entirely based on hearsay or other incompetent evidence is not supported by substantial evidence, and cannot be permitted to stand if seasonably and properly assailed. This it seems to us is the only reasonable and practical construction that should be placed on the industrial act when considered as a whole, as it must be." [23]

The California Act was amended in 1917 so as to make hearsay evidence admissible. "The deceased was crushed between a heavy automobile truck and the road roller while so engaged, and so injured that he died. In the absence of other evidence the law would imply a contract of employment. That a proposition was made by Perry to the deceased by which the latter was to operate the road roller upon a 'fifty-fifty basis' is established by the testimony of Perry and others, and is found by the commission to be a fact. The commission also found that the proposition was never accepted, but was still under consideration at the time of the fatal accident. Perry and his wife testified to conversations with the deceased tending to show an acceptance of Perry's proposition. To rebut this evidence the testimony of decedent's wife, his sister, and other witnesses was received to prove declarations of the deceased made from time to time and up to the day before the accident, to the effect that the deal between Perry and himself had not been consummated. This was hearsay, and petitioner Perry, conceding its admissibility under the express provisions of the statute (Stats. 1917, 60a), states:

23. Garfield Smelting Co. v. Industrial Comm. of Utah, — Utah—, 178 Pac. 57, 3 W. C. L. J. 531; McCauley v. Imperial Wollen Co., 261 Pa. 312, 104 Atl. 617, 2 W. C. L. J. 930; Belcher v. Carthage Machine Co., 224 N. Y. 326, 120 N. E. 735, 17 N. C. C. A. 259.

"It may be said that it is for the commission alone to say as to the weight or credibility to be given to this evidence. If so, then the commission may, arbitrarily or otherwise, as in the present case, disregard in toto all evidence heretofore considered by the law and the courts as admissible, and entitled to any consideration at all, and base its findings on the sandy foundations of some hearsay evidence, giving to such hearsay as great or greater weight than it would be entitled if it were concededly of the most competent character, without limitation on the commission of any sort, or redress on the part of one aggrieved thereby.'

"It being granted that the testimony was admissible, it follows, of course, that the weight of the evidence is to be determined by the commission. It is true that, when we depart from well-recognized principles of law concerning the admissibility of evidence, we embark upon a sea of difficulty. This was pointed out in August, 1915, in Englebretson v. Industrial Accident Commission, 170 Cal. 793, 151 Pac. 421, concerning hearsay evidence. The Legislature, however, has since expressly provided that neither the commission nor its referees—'shall be bound by the common law or statutory rules of evidence or procedure, * * * nor shall any order, award, rule or regulation be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the said common law or statutory rules of evidence and procedure.' Stats. 1917, p. 871, 60a.

"Similar provisions of the law of 1915 have been considered by this court and upheld. Stats. 1915, p. 1102, 77a; Western Indemnity Co. v. Industrial Accident Com'n, 174 Cal. 315, 163 Pac. 60; Employers Liability Ass'n Co. v. Industrial Accident Com'n, 177 Pac. 273.

"It may be remarked, however, in this connection that the testimony of both Perry and his wife, upon which he relies to establish the fact of acceptance by deceased, although permitted by our statute, was inadmissible under the common law, on the ground of their interest in the controversy. 1 Greenleaf on Ev., 326, 328, 333b, 334, 335, 341; Dawley v. Ayers, 23 Cal. 108. The finding of the commission that the relationship between Perry and

the deceased was that of employer and employee is binding upon this court."[24]

To show the development of the law on this subject the earlier California cases are of interest. "The hearsay testimony complained of relative to the statements of the deceased employee relating directly to his injury was competent under the provisions of section 77a of the Workmen's Compensation, Insurance and Safety Act as amended in 1915 (St. 1915, p. 1102.)"[25]

Under the California act, which makes hearsay evidence admissible in cases of death, where the hearsay testimony relates directly to the injury in question, in holding that the statement of deceased as to his crutch slipping resulting in a recurrence of the disability, was admissible, the court said: "Petitioner contends that this statute is not broad enough to cover the present case, in that, as it claims, the evidence as to the manner of occurrence of the second accident does not directly relate to the injury which the statute seeks to compensate. We cannot concede so narrow a construction to the amendment. Its purpose was to permit hearsay evidence to be given in support of a claim in case of death, and as this second injury was the direct outcome of the first, we think the statute broad enough to cover it and to permit hearsay evidence of the manner in which it occurred to be given in this case."[26]

"We cannot agree to the proposition that the rule against the admission of hearsay evidence as proof of a fact is a mere technical rule of evidence. Reck v. Whittlesberger, 181 Mich. 463, 148 N. W. 247. The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to

24. Perry v. Indus. Acc. Comm., 180 Cal. 497, (1919), 181 Pac. 788, 4 W. C. L. J. 350; Employers Liab. Assn. Corp. Ltd. v. Indus. Comm., 179 Cal. 432, 171. Pac. 273, 3 W. C. J. 407, 17 N. C. C. A. 942, 18 N. C. C. A. 579; Pigeon v. Employer's Liab. Assn. Corp,. 216 Mass. 51 Ann. Cas. 1915A 737, 4 N. C. C. A. 516; Boston v. Turner. 201 Mass. 190, 196, 87 N. E. 634.

25. Western Indemnity Co. v. Industrial Acc. Comm. 174 Cal 315, 163 Pac. 60, 14 N. C. C. A. 433.

26. Shell Co. of Cal. v. Indus. Comm., 36 Cal. App. 463, 172 Pac. 611, 17 N. C. C. A. 257.

the introduction of fresh exceptions to an old and well established rule, the value of which is felt and acknowledged by all."[27]

The Illinois rule differs from the above in an important respect, following more nearly the English rule. "Declarations made by one injured to his attending physician are admissible in evidence when they relate to the part of his body injured, his suffering, symptoms, and the like, but not if they relate to the cause of the injury."[28]

In another Illinois case the court said: "The testimony of witnesses as to whether the injury arose out or in the course of employment was all purely hearsay and incompetent. The fact that statements were made by Favre to doctors who treated him did not render their testimony competent. Declarations made by one injured, to his attending physician, are admissible in evidence when they relate to the part of the body injured and his symptoms and sufferings, because a physician is necessarily guided to some extent by such information, free from suspicion of being spoken to with reference to future litigation, but the statements are not competent if they relate to the cause of the injury. (Illinois Central Railway Co. v. Sutton, 42 Ill. 438 (8 Am. Neg. Cas. 154); Chicago and Alton Railroad Co. v. Industrial Board, 274 id. 336; Globe Accident Ins. Co. v. Gerisch, 163 id. 625 (54 Am. St. Rep. 486); Reck v. Whittlesberger, 5 N. C. C. A. (Mich.) 917; Gilbey v. Great Western Railway Co., (1910), 3 B. W. C. C. 135; Amys v. Barton, (1912), 1 K. B. 40; People v. Davidson, 30 Vt. 377 (73 Am. Dec. 312).) The testimony of the witnesses concerning what Favre said to them as to the cause of the injury and where and how it occurred was incompetent and should not have been admitted, and was insufficient to sustain the award."[29]

The Indiana and Pennsylvania courts take the view that the industrial board is not bound by the technical rules of court procedure in civil actions, including those relating to hearsay evi-

27. Englebretson v. Indus. Acc. Comm., 170 Cal. 793, 151 Pac. 421.

28. Chicago & A. R. Co. v. Indus. Bd. of Ill. 274, Ill. 336, 113 N. E. 629, 14 N. C. C. A. 431.

29. Peoria Cordage Co. v. Indus. Bd. of Ill. 284 Ill. 90, 119 N. E. 996, 17 N. C. C. A. 245.

dence, therefore an employer's report showing the character of the injury and that it was within the scope of the employment is admissible as a statement by a party primarily liable, notwithstanding its ex parte character and is not within the hearsay rule. The printed portion of the employer's report must be considered his voluntary statement by adoption unless otherwise qualified This report of the employer is admissible even though it was based upon hearsay evidence. Hearsay evidence must be objected to in order to overcome the presumption that he consented to its admission.[30]

Where deceased told claimant that his physician told him that he had erysipelas, such statement had no probative value.[31]

"The commissioner permitted witnesses to rehearse the story of the accident as told by the deceased. This was hearsay testimony, plainly inadmissible. But the allowance of hearsay evidence by the commissioner does not require this court to reverse his decree, unless such decree was in whole, or in part, based upon such incompetent testimony."[32]

Evidence of a verbal report of the injured employee to his foreman a day or so prior to his death, has been held admissible.[33]

A statement of a deputy commissioner to the effect that $350 had been paid upon a mortgage, was improper evidence for the

30. Hege & Co. v. Tompkins, — Ind. App. —, (1919), 121 N. E. 667, 3 W. C. L. J. 451; McCauley v. Imperial Wollen Co., 261 Pa. 312, 104 Atl. 617, 2 W. C. L. J. 930, 17 N. C. C. A. 864.

31. Larke v. John Hancock Mut. Life Ins. Co., 90 Conn. 303, 97 Atl. 320, 12 N. C. C. A. 308.

32. Mailman v. Record Fdry. & Mach. Co., 118 Me. 172, (1919), 106 Atl. 606, 4 W. C. L. J. 205; Pigeon's Case, 216 Mass. 55, 102 N. E. 932, Ann. Cas. 1915A, 737; Derinza's Case, 229 Mass. 444, 118 N. E. 942; Cadillac Motor Co., 199 Iich. 435, 165 N. W. 651; First National Bank of Milwaukee v. Indus. Comm., 161 Wis. 526, 154 N. W. 847, 14 N. C. C. A. 438; Reck v. Whittlesberger, 181 Mich. 463, 5 N. C. C. A. 917; Fitzgerald v. Lozier Motor Co., 187 Mich. 660, 154 N.W. 67, 10 N. C. C. A. 560; Slate Indus. Comm. v. Downey-Snell Logging Co., 184 N. Y. S. 417, 7 W. C. L. J. 129. (1920).

33. Texas Employers' Ins. Ass'n. v. Mummey,—Tex. Civ. App. —, 200 S. W. 251, 17 N. C. C. A. 266,

Industrial Board to base its finding upon; for although the board is empowered to appoint deputy commissioners to make investigations under the Michigan Act, still the act does not make their report evidence. This evidence was clearly hearsay and, when standing alone, it was not sufficient to support a finding.[34]

§ 509. **Res Gestae.**— Evidence admissible on the ground that it is part of the res gestae must, as to time, be a part of the incident in question or at issue. If it is a subsequent narration of what transpired at the time of the happenings of the incident in question it is not admissible as part of the res gestae. "Matters incidental to a main fact and explanatory of it, including acts and words which are so closely connected with a main fact as will constitute a part of it, and without a knowledge of which the main fact might not be properly understood; events speaking for themselves through the instinctive words and acts of participants, not the words and acts of participants when narrating the events; the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character; including everything which may fairly be construed an incident of the event under consideration."[35] In a Michigan case the court said: "The statements made by deceased to his family as to the accident he suffered were made at a place some distance away, several hours thereafter, were but the narration of past events and were not a part of the res gestae. Merkle v. Township of Bennington, 58 Mich. 156; Jones v. Village of Portland, 88 Mich. 598, 5 N. W. 731."[36]

A statement by deceased at the time of the injury that he had busted something, was admissible as part of the res gestae. The court said: "The statement was made at the place the accident occurred, and, it is a fair inference from all the circumstances shown by the evidence, within a very few minutes after the occurrence.

34. Blozina v. Castile Mining Co., — Mich. —, (1970), 178 N. W. 57, 6 W. C. L. J. 327,

35. 34 Cyc. page 1642.

36. Ginsberg v. Burroughs Adding Mch. Co., 204 Mich. 130, 170 N. W. 15.

We think the statement was admissible in evidence as part of the res gestae."[37]

"The commissioner permitted the introduction of testimony that when the deceased was discovered, on the morning of April 19, 1917, he said: 'I got hurt,' and then or afterward indicated where he was hurt. Counsel for plaintiff urges that this testimony was admissible as a part of the res gestae. This contention is sound. It is admissible but only as tending to show the physical condition of the deceased at the time.

"If the man had been groaning or screaming, no law would forbid proof of such fact. The rule remains the same where pain finds articulate expression. Heald v. Thing, 45 Me. 394; Hutchins v. Ford, 82 Me. 378, 19 Atl. 832; Barber v. Merriam, 11 Allen (Mass.) 322.

"But the effect of this testimony is limited by its purpose. It must be treated as an expression of present condition, and not as an abbreviated narrative of an occurrence in even the immediate past. Asbury Insurance Co. v. Warren, 66 Me. 529, 22 Am. Rep. 590; Gosser v. Ohio Valley Water Co., 244 Pa. 59, 90 Atl. 540, Ann. Cas. 1915C 685; Peoria Cordage Co. v. Ind. Board, 284 Ill. 90, 119 N. E. 996, L. R. A. 1918E, 822."[38]

In a Kansas case the court said: "The rule is that for statements of an injured person to be admissible in evidence, they must be shown to have been made at a point of time so close to the alleged injury as to be entirely spontaneous. As said in State v. Powers, 92 Kan. 225, 139 Pac. 1167:

" 'To be admissible as part of the res gestae, as that term is commonly used, it must have been uttered so near in point of time to the act referred to that the nervous excitement may still be supposed to dominate, and the reflective powers to be in abeyance, 3 Wigmore on Evidence, Sec. 1750. "What the law altogether distrusts is not afterspeech but afterthought. * * * That they (the declarations) shall be, or appear to be spontaneous is indispen-

37. Southwestern Surety Co. v. Owens, — Tex. Civ. App. —, 198 S. W. 662, 17 N. C. C. A. 258.

38. Mailman v. Record Foundry & Mach. Co., 118 Me. 172, (1919), 106 Atl. 606, 4 W. C. L. J. 205.

sable, and it is for this reason alone that they are required to be speedy.'' Travelers Ins. Co. v. Sheppard, 85 Ga. 751, 775, 776 (12 S. E. 18)' ''[39]

A physician's testimony as to the cause of the injury, as given to him by the injured, is admissible, but testimony as to where the accident occurred as given by the injured to the attending physician, is incompetent, as these statements, made some time subsequent to the occurrence, formed on part of the res gestae.[40]

§ 510. **Knowledge Communicated to Physicians.**—Knowledge communicated to an interne by the injured employee at a hospital, as to how the accident occurred, was held to be incompetent evidence in a proceeding for compensation.[41]

The court, in passing on the admissibility of testimony of a physician, which was gained through personal examination, said: ''The patient may be deemed to have given consent to the doctor testifying with regard to knowledge gained through verbal communications made by the patient when the patient has referred to such communications in his pleadings or in testimony, but such reference does not open the door to the physician to also testify as to his knowledge gained by a personal examination of the patient, and such is the testimony called for by the question.''[42]

In a California case it was held that physicians' reports are admissible, and are the same as admissions of the facts contained therein, as against the party introducing the report.[43]

The opinion of a medical expert as to the probable cause of the death of an employee is clearly admissible, although its

39. Mayeur v. J. R. Crowe Coal & Mining Co., —Kan.—, 186 Pac. 1035, 5 W. C. L. J. 526.

40. Valentine v. Weaver, — Ky. App. —, (1921), 228 S. W. 1036.

41. Chicago Packing Co. v. Indus. Board of Ill., 282 Ill. 497, 118 N. E. 727, 17 N. C. C. A. 261.

42. Inspiration Consol. Copper Co. v. Mendez, 19 Ariz. 151, 166 Pac. 278, 17 N. C. C. A. 261.

43. Mass. Bond & Ins. Co. v. Indus. Comm., 176 Cal. 488, 168 Pac. 1050, 17 N. C. C. A. 264.

weight is subject, like other evidence, to criticism in an argument before a jury.[44]

Where all parties agreed that the commissioner's physician make the examination of the injured employee and report whether the disability was due to injury or disease, and he based his report partly upon reports of assisting physicians the findings as an entirety was admissible as evidence.[45]

Testimony of an osteopath based upon personal examination is admissible as competent evidence, where it was based upon actual inspection, and not merely testimony relative to subjective symptoms.[46]

Depositions of a physician as to a servant's injuries were admissable, although hearsay, as to the employer and insurance carrier who were not parties to the taking of the deposition.[47]

§ 511. **Verdict of Coroner's Inquest.**—The introduction in evidence of a coroner's verdict that deceased "came to his death" from natural causes and heat prostration, over the defendant's objection, was held to be error, but since there was no question as to the cause of the death, which was established by other evidence, the defendant was not prejudiced thereby.[48]

The court in this case took no notice of the several earlier, though recent, Illinois cases to the contrary. While the court's opinion in this case was too brief to be explicit it is perhaps sufficiently general that we may infer, in line with earlier decisions, that in so far as the coroner's verdict undertakes to say that the employee met his death "while in the discharge of his duties"

44. Walsh v. River Spinning Co., 41 R. I. 490, 2 W. C. L. J. 689, 103 Atl. 1025, 18 N C. C. A. 298; Santa v. Indus. Acc. Comm., 175 Cal. 235. 165 Pac. 689, 17 N. C. C. A. 260; Sillix v. Armour & Co., 99 Kan. 103, 160 Pac. 1021, 14 N. C. C. A. 433.

45. Mesmer & Rice v. Indus. Comm., 177 Cal. 466, 173 Pac. 1099, 2 W. C. L. J. 743, 17 N. C C. A. 264.

46. Heed v. Indus. Comm., 287 Ill. 505, (1919), 122 N. E. 801, 4 W. C. L. J. 27.

47. Ocean Acc. & Guar. Corp. Ltd. v. Indus. Comm., 180 Cal. 389, (1919), 182 Pac. 35, 4 W. C.L. J. 472.

48. City of Joliet v. Indus Comm., 291 Ill. 555, 126 N. E. 618, 5 W. C. L. J. 802.

for his employer, it is inadmissable, in that the finding of such fact is beyond the province of the coroner and his jury.[49]

Where the death resulted from disease, a coroner's verdict was inadmissible as evidence.[50]

In another Illinois case, in which the admission of a coroner's verdict was claimed to be error, the court, in affirming the judgment, said: "Proceedings under the workmen's compensation act take the place of the ordinary action on the case against an employer for damages for causing the death of or injury to an employee. In actions for causing death by negligence we have held such evidence proper."[51]

§ 512. **Evidence of Negligence.**—In proceedings before the industrial accident commission against an assenting employer evidence of negligence is irrelevant.[52]

But under the New Hampshire Act contributory negligence is a defense to a compensation claim, and such evidence is admissible.[53]

Where an insurer seeks subrogation from a negligent third party, such negligence must be established by competent evidence and cannot rest alone on mere conjecture.[54]

§ 513. **Proof of Relation of Employer and Employee.**—Where it was sought out to establish the relation of employer and em-

49. Peoria Cordage Co. v. Indus. Bd. of Ill., 284 Ill. 90, 119 N. E. 996, 2 W. C. L. J. 451, 17 N. C. C. A. 245 (1918).

50. Albaugh-Dover Co. v. Indus. Bd., 278 Ill. 179, 115 N. E. 834, 14 N. C. C. A. 435.

51. Victor Chemical Works v. Industrial Board of Illinois, 274 Ill. 11, 113 N. E. 173, 14 N. C. C A. 434; Lavin v. Wells Bros., 204 Ill. App. 303, 17 N. C. C. A. 260; Ohio Building Safety Vault Co. v. Indus. Bd. 277 Ill. 96, 115 N. E. 149, 14 N. C. C. A 224; Armour & Co. v. Indus. Comm., 273 Ill. 590, 113 N. E. 138, 14 N. C. C. A. 434.

52. Nadeau v. Caribou Water Light & Power Co., 118 Me. 325, (1919), 108 Atl. 190, 5 W. C. L. J. 238.

53. Pellerin v. International Cotton Mills, —C. C. A. —, 248 Fed. 242, 2 W. C. L. J. 3.

54. Travelers' Insurance Co. v. Healy Plumbing & Heating Co., —Minn. —, 179 N. W. 689, 7 W. C. L. J. 83.

ployee, "the trial court did not err in sustaining an objection to the following question, put to relator: 'Did Tom Johnson tell you he was going to enter service?' referring to Johnson's entry into the military service of the United States during the war with Germany. The contention that, if the question had been answered in the affirmative, it would have demonstrated the impossibility of Johnson being relator's employer at the time of the injury, cannot be sustained.

"There was no error in the admission of Wilcox's ledger account with Johnson in connection with the written contract between them, which expressly provided that Wilcox should pay the workmen their weekly wages. The fact that he paid relator his wages and charged the amount to Johnson tended to establish Wilcox's contention that he was not relator's employer."[55]

"Counsel for plaintiff in error earnestly insist that the deceased was an independent contractor, and not an employee of the Bristol & Gale Company within the terms of the Workmen's Compensation Act, and that therefore the applicant was not entitled to compensation under the act. Under the proof in this record we think that the evidence as to the teams owned, operated, and controlled by Johnson's wife has no real bearing on the question whether Johnson was an independent contractor or an employee of plaintiff in error. The evidence, we think, is clear that the deceased was in no way connected with the ownership of the teams of Mrs. Johnson at the time they were employed by plaintiff in error or at any other time. They were hired from Mrs. Johnson direct and paid for by check to her order. The drivers of those teams were hired by Mrs. Johnson, and her husband in no way controlled their operation."[56]

It has been held in California that hearsay testimony will not be considered in proving the status of a person as an employee or an independent contractor.[57]

55. State ex rel. Berquist v. District Court of Beltrami Co., 145 Minn. 127, 176 N. W. 165, 5 W. C. L. J. 549.

56. Bristol & Gale Co. v. Indus. Comm. 292 Ill. 16, 126 N. E. 599, 5 W. C L. J. 790.

57. Connolly v. Indus. Acc. Comm. of Cal., 173 Cal. 405, 160 Pac. 239.

§ 514. **Exclusion of Irrelevant Admission of Relevant Evidence in Same Document.**—In a servant's action against a corporation for injuries due to exposure to weather while lost upon the prairie, the court said: "the articles of incorporation of appellant, with an amendment thereto whereby the capital stock was increased from $100,000 to $1,000,000 was offered in evidence by appellee over an objection made that same was irrelevant and immaterial. It is urged that the introduction of the charter showing appellant to be a million-dollar corporation was harmful and prejudicial. The charter was properly admissible in evidence for the purpose of showing that appellant was running a cattle ranch, and not a farm. Further, it was evidence of R. L. Slaughter's connection with the corporation and the capacity in which he was connected, as the articles show he was a director. It may be conceded that that portion of the charter showing an increase of its capital stock from $100,000 to $1,000,000 was irrelevant and immaterial, but appellant urged simply a general objection to the admissibility of the charter as a whole. A part being thus admissible, and the objection being to the whole, there was no error in overruling the objection. The court was not required to separate that which was admissible from that which was inadmissible. The objector should do that. Railway Co. v. Gormley, 91 Tex. 393, 43 S. W. 877, 66 Am. St. Rep. 894; Railway Comm. v. Railway Co., 212 S. W. 535."[58]

§ 515. **Employers' Reports Admissible.**—"The employer made and filed a report of the accident, pursuant to the rules of practice of the Industrial Commission (rule 2), stating that the elevator operator lost control of the car and that it dropped to the bottom; that Lesperance was in the car and was injured. The contents of this report are competent and establish a prima facie case. First National Bank of Milwaukee v. Industrial Commission, 161 Wis. 526, 154 N. W. 847. The provision of section 2394—16, Stats., clearly contemplates that the commission may cause the facts pertaining to industrial accidents to be ascertained

58. C. C. Slaughter Cattle Co v. Pastrana, —Tex. Civ. App.—, (1919), 217 S. W. 749, 5 W. C. L. J. 599.

by them in this manner and may be considered by them on final hearing.

"The evidence of the attending doctor is, in substance, that the deceased informed him, when he was called to his attendance within about an hour after the alleged accident, that the drop of the elevator hurt him, and that when he examined the injured intestine and the imperfect truss he concluded that the shock caused by the drop of the elevator was the primary cause of the injury to the intestine. This evidence is of such substantial character that a reasonable conclusion can be drawn therefrom that the injury was proximately caused by the accident. Such evidence was held to be proper proof on the subject in Wright v. Kerrigan, (1911), 2 Irish Reports, 301; Bank v. Ind. Com., supra.

"The objection that the employer's report of the accident was not formally offered in evidence is not well taken. The employer was fully aware of the contents of this report. If any corrections thereof were deemed necessary, they should have been brought to the attention of the commissioners upon the hearing. The proceedings before the commission are not to be hampered by useless formalities nor technicalities. Anderson v. Miller, S. I. Co., (decided Jan. 7, 1919) 170 N. W. 275; Mary Carroll's Case, 225 Mass. 203, 114 N. E. 285; 1 Bul. Ill. Ind. Board, 178; Borgnis v. Falk Co., 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489."[59]

Employer's reports to the industrial commission when not objected to are prima facie evidence of the statements contained therein.[60]

§ 516. **Reception of Evidence.**—"The return of the commission to the order to show cause discloses a case where, in all fairness, to say the least, the hearing should not have been proceeded

59. F. Eggers Veneer Seating Co. v. Indus. Comm., 168 Wis. 377, (1919), 170 N. W 280, 3 W. C. L. J. 396; Anthus v. Rail Joint Co., — N. Y. App. Div.—, 185 Supp. 385, 7 W. C. L. J. 314.

60. Tex. Employers' Ins. Ass'n v. Mummey, —Tex. Civ. App.—, 200 S. W. 251, 17 N. C. C. A. 262; In re Carroll, 225 Mass. 203, 114 N. E. 285, 14 N. C. C. A. 435; First Nat Bk. of Milwaukee v. Indus. Comm., 161 Wis. 526, 154 N. W. 847, 14 N. C. C. A. 436.

with by the referee in the absence of the petitioner or some one representing it. This being true and the hearing having been nevertheless proceeded with, the commission in its turn should have reopened the matter for such cross-examination or counter testimony as the petitioner might properly desire, except upon one contingency, namely, that there was no possibility of such cross-examination or counter testimony changing the result."

But a reopening will not be granted on the grounds that a deposition introduced was inadmissible as hearsay in the absence of an offer to rebut the matter contained in the deposition.[61]

A compensation commissioner may take cognizance of scientific authority and data in arriving at a conclusion.[62]

"The award seems to be based upon answers given by experts to hypothetical questions, after the case was adjourned, and upon opinions given by the chief medical examiner outside of the hearing. The hypothetical question embraced certain material matters not covered by the statements of the experts at the trial. Such practice is irregular, and denied to the employer the hearing contemplated by the law. We would therefore favor a reversal of the award, except for the following reason: Upon the last rehearing the commission stated the facts referred to and filed the answers of the experts as a part of their proceeding. This method of procedure was not objected to by the appellants. They did not ask that the chief medical examiner or the experts be produced for examination. We conclude, therefore, that the question was waived and thereafter furnished no ground for reversal."[63]

Where an adjuster appeared before the commissioner as representative of both the employer and insurer, to obtain the approval of the commission to an agreement for compensation, statements made by him that deceased had been struck on the face with a

61. Ocean Acc. & Guar. Corp. Ltd. v. Indus. Acc. Comm., 180 Cal. 389, (1919), 182 Pac. 35, 4 W. C. L. J. 472.

62. Chiulla De Luca v. Board of Park Commissioners of City of Hartford, 94 Conn.—, (1919), 107 Atl. 611, 4 W. C. L. J. 595.

63. Holmes v. Communipaw Steel Co., (1919), 174 N. Y. S. 772, 186 App. Div. 645, 3 W. C. L. J. 647.

board or plank, were proper to be considered by the commission in making an award.[64]

"The objection that the employer's report of the accident was not formally offered in evidence was not well taken. The employer was fully aware of the contents of the report. If any corrections thereof were deemed necessary they should have been brought to the attention of the commissioners upon the hearing."[65]

Evidence on questions before the industrial board must not be taken ex parte.[66]

"On the subject of the proofs, section 428, Pennsylvania Act (P. L. 755) of the act of 1915, provides that 'neither the board nor any referee shall be bound by the technical rules of evidence in conducting any hearing or investigation.' Section 417 (P. L. 752) provides that the referee, 'either before or after any hearing,' may 'make an investigation of the facts set forth in the petition, or cause the same to be made,' and that, with the consent of the board, he may appoint impartial experts to 'ascertain the facts;' while section 421 states the board shall have power to make such investigations as it may deem necessary to ascertain the facts, and to 'employ physicians, surgeons, or other experts, to aid in its investigation.' Section 17 of the companion act of June 2, 1915 (P. L. 758, 760), also provides that:

" 'The board and every referee shall have the power to conduct any investigation which may be deemed necessary to ascertain the facts of any claim, or any other matter properly before such board or referee,' and 'such investigations may be made by the board or referee, personally, * * * or by any other person or persons authorized by law.'

"These provisions do not mean, however, that either the referee or board has the right to find material facts on hearsay alone, whether such evidence is developed in the course of formal hear-

64. Riccio v. Montano, 93 Conn. 289, 105 Atl. 625, 3 W. C. L. J. 586.

65. F. Eggers Veneer Seating Co. v. Indus. Comm., 168 Wis. 377, 170 N. W. 280, 3 W. C. L. J. 396.

66. Ruda v. Indus. Bd., 283 Ill. 550, 119 N. E. 579, 2 W. C. L. J. 220, 16 N. C C. A. 751.

ings or in less formal investigations; for, in the first place, the rule which forbids the making of material findings on hearsay alone, is more than a technical rule of evidence and, next, there is nothing in the act before us which justifies the conclusion that the Legislature intended any such loose method for determining material facts. The act permits liberal investigation, by hearing and otherwise; but after all the data have been gathered without regard to technical rules, then the proofs must be examined, and that which is not evidence within the meaning of the law, must be excluded from consideration; that is to say, when all the irrelevant and incompetent testimony has been put aside, the findings must rest upon such relevant and competent evidence of sound, probative character as may be left, be this either circumstantial or direct."[67]

Where the board proceeded on erroneous principles of law and the award was reversed, the widow is entitled to introduce further evidence at a new hearing, and if she avails herself of this privilege, the insurer is entitled to the same privilege, and the case is considered anew on the point erroneously decided.[68]

In a New York case the court said: "It will be observed that the proof of sunstroke is chiefly made up of hearsay statements and declarations. These statements, however, were either introduced by the insurance carrier itself or were received without objection. The carrier cannot now be heard to claim that such statements were incompetent and have no probative value. Nothing is more common than for testimony to be given which is not, in its nature, strictly competent, upon matters about which both parties are conscious that there is no dispute; matters which both fully understand to be true. And such evidence is taken, because the adverse party makes no question of the fact it tends to establish. He can never be permitted to say, on appeal, that the fact was not proved, because the evidence offered and received

67. McCauley v. Imperial Woolen Co., —Pa.—, 104 Atl. 617, 2 W. C. L. J. 930, 17 N. C. C. A. 864.

68. In re Derinza, 229 Mass. 435, 118 N. E. 942, 1 W. C. L. J. 795, 16 N. C. C. A. 210.

was not competent testimony, and ought to have been objected to and rejected."[69]

In determining the percentage of loss of use of a member, it is competent to prove conditions such as comparative ability of employee to do certain things in the use of a member before and after the accident, as well as any other fact which will afford an opportunity of determining the percentage of loss of use.[70]

An expression of opinion, by the injured party, as to the extent of loss of use of a member is incompetent, and an award can not be based thereon;[71] but where other testimony tended to establish the extent of impairment the case will not be reversed, because the employee was allowed to give his opinion as to the extent of the injury.[72]

§ 517. **Dying Declaration.**—The court, in holding that dying declarations when made under the proper circumstances are admissible, said: "The plaintiffs rely, of course, upon the doctrine first announced in Thurston v. Fritz, 91 Kan. 468, 138 Pac. 625, 50 L. R. A. (N. S.) 1167, Ann. Cas. 1915D, 212, that dying declarations are admissible in civil cases. The court felt that the time had arrived to declare that the rule limiting the admissibility of such declaration to criminal cases was one which had no reasonable basis to support it. The court is satisfied with the decision in that case, and the only question here is whether sufficient foundation was shown for admitting the statement as a dying declaration. We think it must be held that the evidence was sufficient to show that the statement was made by the deceased at a time when he was under a sense of impending death. It has been held that it is not necessary that the declarant state that he had abandoned all hope and regarded his death as impending and certain.

69. Hernon v. Holahan, 182 N. Y. App. Div. 126, 169 Supp. 705, 1 W. C. L. J. 1120, 17 N. C. C. A. 1002.

70. International Coal & Mining Co. v. Indus. Comm., —Ill.—, (1920), 127 N. E. 703, 6 W. C. L J. 278.

71. Decatur Const. Co. v. Indus. Comm., —Ill.—, (1921), 129 N. E. 738, Old Ben Coal Corp. v. Indus. Comm., — Ill. —, (1921), 129 N. E. 772.

72. Hafer Washed Coal Co. v. Indus. Comm., — Ill. —, 129 N. E. 521.

sufficient is shown to take to the jury the question of the declarant's fear of impending death and the question of the crediblity of the declaration. State v. Smith, 103 Kan. 148, 174 Pac. 551, and cases cited in the opinion."[73]

In a Tennessee case it was held that dying declarations of an employee, as to the cause of the fire which resulted in his death, were not admissible, since dying declarations are not admissible in civil cases.[74]

§ 518. **Written Statement of Fellow Employee not Admissible as Against Employer.**—"Under the Kansas Workmen's Compensation Act (Gen. St. 1915, Sec. 5896-5942), a written report concerning the injury of an employee, made by another employee, or manager, at the request of the employer, which report contains statements regarding the accident and the injury to the employee, but which shows, on its face, that the statements are those of the injured employee, and are not the admissions of the employer, is not admissible in evidence for the purpose of proving that the accident occurred, or of proving the nature of the injury."[75]

In proceedings before the commission it was sought to introduce the pay roll of another company for the purpose of determining whether the relation of employer and employee existed. The court held such document to be incompetent, it not having been signed by deceased nor had it been seen by him.[76]

§ 519. **Admissibility Generally in Specific Cases.**—The Court, in holding that an unsworn statement of an opinion based upon the perusal of the testimony was entitled to no weight, said: "It was not made under oath. It was not part of the evidence given before the referee or before the cmmission. The employer

73. Vassar v. Swift & Co., 189 Pac. 943, — Kan. —, (1920), 6 W. C. L. J. 166.

74. Milne v. Sanders, —Tenn.—, (1921), 228 S. W. 702.

75. Lindsay v. Halstead Milling and Elevator Co., 104 Kan. 410, (1919), 179 Pac. 360, 3 W. C. L. J. 718.

76. Alaska Treadwell Gold Mining Co. v. Crinis, 255 Fed. 810, 3 W. C. L. J. 679.

and the insurer were not informed that it was to be given to the board, or considered, or that it was filed, and they had no opportunity to interrogate Gibbons (by whom the statement was made), or to endeavor to make further proof that the fracture was not oblique, or that the slipping was not due to natural causes, or the conditions he appears to have assumed did not exist."[77]

Evidence of the habit of a stable boy, who was found dead in the stable, to tease the horses was held to be admissble as showing the probable cause of the death.[78]

The statement by an employee that he was through with his work until he got back again, is not binding upon the commission as to the termination of the employment.[79]

Evidence of ill-treatment by a foreman was inadmissible, where there was no dispute as to the fact that the injury arose out of the employment, and was prejudicial to the employer in that it would excite a feeling against him in the minds of the jurors.[80]

Depositions which are taken irregularly are inadmissible in evidence,[81] but where the objection does not relate to the substance they are admissible as where the board did not make the statutory request in writing to take depositions in a foreign country.[82]

Affidavits of parents of deceased residing in Ireland, and taken before a commissioner of oaths of the state of New York, are ad-

77. Pac. Coast Cas. Co. v. Pillsbury, 171 Cal. 319, 153 Pac. 24, 14 N. C. C. A. 437.

78. Joy v. Phillips, Mills & Co., Ltd., (1916), W. C. & Ins. Rep. 67, 14 N. C. C. A. 437.

79. Hackley Phelps-Bonnell Co. v. Indus. Comm., 165 Wis. 586, 162 N. W. 921, 14 N. C. C. A. 438.

80. Ruth v. Witherspoon-Englar Co., 98 Kan. 179, 157 Pac. 403, 14 N. C. C. A. 438.

81. Shaffer v. D'Arcy Spring Co., 199 Mich. 537, 165 N. W. 825, 17 N. C. C. A. 263, 1 W. C. L. J. 418; Hamilton v. Macey Co., 195 Mich. 747, 162 N. W. 289, 14 N. C. C. A. 436; Moran v. Rodgers & Hagerty, Inc., 180 App. Div. 821, 168 N. Y. S. 410, 17 N. C. C. A. 263; Lobuzek v. American Car & Foundry Co., 194 Mich. 533, 161 N. W. 139, 14 N. C. C. A. 423; Eretza v. Ft. Montgomery Iron Works, 184 N. Y. Supp. 789, 7 W. C. L. J. 99.

82. In re Derinza, —Mass.—, 118 N. E. 942, 1 W. C. L. J. 795.

missible on the question of dependency.[83] A transcript of the evidence taken at a previous hearing was held admissible where the reporter testified it was correct altho it was not authenticated by the signature of the parties, attorneys or chairman of the board.[84]

Statements by one at the stables where the accident occurred, to a police officer, who knew the party to be the foreman, that deceased was an "extra man," and that he, the foreman, had sent deceased into a stall to feed a horse that was a kicker, and the horse kicked him, were admissible.[85]

It has been held in an Oklahoma case that: In a proceeding under the Oklahoma Workmen's Compensation Law, chapter 246, Sess. Laws 1915, unsworn opinion evidence, given without notice to the employer or the insurer that it was to be offered to the commission or that it was filed, and without opportunity to interrogate such witness, or to make further proof to controvert such evidence, should not be considered by the commission, and where it appears that findings and conclusion of the commission were based on such opinion evidence, the award will be vacated and the cause remanded to the commission.[86]

Evidence of conditions subsequent to the accident, or orders respecting changes to be made or repairs thereafter made, is incompetent except so far as it tended to show the conditions as they existed at the time of the accident.[87]

In a proceeding under the Michigan act for compensation for death of a soliciting brewery salesman, a prospective customer was permitted to testify relative to negotiations for purchase of beer, and his agreement to meet the deceased at a hotel to conclude negotiations, when the deceased was killed while on his way to such

83. Moran v. Rodgers & Hagerty, 168 N. Y. Supp. 410, 1 W. C. L. J. 694.

84. Bloomington D. & C. R. Co. v. Indus. Bd., — Ill. —, 114 N. E. 939, A 1 W. C. L. J. 337.

85. Baer's Express & Storage Co. v. Indus. Bd., 282 Ill. 44, 118 N. E. 412, 17 N. C. C. A. 259.

86. Flynn v. Ponca City Milling Co., —Okla.—, 177 Pac. 366, 3 W. C. L. J. 519.

87. Beckles' Case, 230 Mass. 272. 119 N. E. 653, 2 W. C. L. J. 278, 17 N. C. C. A. 434.

hotel. The court said: "It was competent for the manager of the brewing company to testify to the nature and scope of the employment, and of conversations about the business. And we think that it was also competent for Mr. Perrigo to testify relative to the negotiations, and the arrangement with Mr. McMinn for the meeting at the hotel.

"We have repeatedly held that, under the statute, if there was competent evidence to support the finding, we will not review or weigh the evidence. We think there was some evidence in support of these findings. We are of the opinion that from the evidence which we have quoted, an inference can be drawn that Mr. McMinn, at the time of his accident, was on his way to the place of business of Perrigo, in the course of his employment, and that the accident arose out of and in the course of his employment. We consider the case a close one upon the facts, but it is not our duty to weigh the evidence."[88]

A compensation award is not competent evidence to establish that an employer was a "subscriber" within the meaning of the Texas Act, since a suit to set aside an award is a trial de novo, and the facts entitling claimant to relief must be established by competent evidence.[90]

Where the employer offered testimony to the effect that claimant had wilfully attempted to climb the side of a motor truck while in motion, the servant might properly introduce testimony that another man had been run over near the place, at about the same time claimant was injured; the employer's witness, not having definitely identified the appellee in describing the accident which he observed, might have had reference to the other occurrence.[91]

Averments in motions for taking depositions are not evidence.[92]

88. McMinn v. C. Kern Brew. Co., 202 Mich. 414, 168 N. W. 542, 2 W. C. L. J. 645, 18 N. C. C. A. 302.

90. Texas Employers Ins. Ass'n. v. Pierce, —Tex. Civ. App. — (1920), 230 S. W. 872.

91. F. B. Beasman & Co. v. Butler, 133 Md. 382, 105 Atl. 409, 3 W. C. L. J. 478.

92. Perotte's Case, 233 Mass. 297, (1919), 123 N. E. 776, 4 W. C. L. J. 391.

An agreement to pay compensation, made after the accident, is evidential of the occurrence of an accident and of the right to recover compensation therefor; but not conclusive evidence nor an estoppel to disprove the accident, if made within a year thereafter. In a compensation suit it is error to exclude proof in denial of the occurrence of the accident, simply because of the existence of such an agreement.[93]

In a suit by an employer to recover compensation paid for the death of an employee, caused by the negligence of a third party, it was not error to exclude evidence of the fact that the employer had insured his employees and that the claim was paid by his insurance carrier, since the insurance on the employees was for the benefit of the employees and not for the negligent third party.[94]

The court will not take judicial notice of the action of lightning under its authority to take such notice of the "Laws of Nature."[95]

Testimony taken ex parte is not to be made the foundation of a decree until introduced in evidence, so that either party may have a chance to explain or contradict it.[96]

Where the admission of incompetent evidence did not prejudice the employer, the case will not be reversed on writ of error.[97]

93. Burns v. Edison, 92 N. J. L. 288, (1919), 105 Atl. 717, 3 W. C L. J. 645, 18 N. C. C. A. 747.

94. Vose v. Cent. Ill. Pub. Service Co., 286 Ill. 519, 122 N. E. 134, 3 W. C. L. J. 613; Otis Elevator Co. v. Miller & Paine, 240 Fed. 376, 15 N. C. C. A. 302, 14 N. C. C. A. 1013.

95. Wiggins v. Industrial Acc. Bd., 54 Mont. 335, 170 Pac. 9, 17 N. C. C. A. 246.

96. Gauthier v. Penobscot Chem. Fiber Co., —Me.—, (1921), 113 Atl. 28.

97. Chicago & N. W. Ry. Co. v. Gray, 237 U. S. 399, 59 L. Ed. 1018, 35 Sup. Ct. R. 620, 9 N. C. C. A. 452; Watters v. P. E. Kroehler, Mfg. Co., 187 Ill. App. 548, 8 N. C. C. A. 352.

Where there was evidence that at the time of the accident deceased was sober, evidence of his habitual intemperance was incompetent.[98]

A witness may testify to conclusions if he states the facts upon which he bases his conclusion.[99]

Evidence respecting a deceased's son's intention to send his mother the portion of his wages remaining after paying his board, was held to be admissible as relevant on the question of the mother's dependency.[1]

Evidence given after refreshing the witness's memory from an affidavit he made at the time of the accident, and which he was ready to swear to as his and to the correctness of the affidavit at the time of its making, was properly received.[2]

Where an insurer brings action against a negligent third party, claiming to be subrogated to the employee's rights, the policy of insurance is admissible in evidence.[3]

The transcript of a record in a criminal case is not admissible in a compensation proceeding where the parties are not the same in both actions since they had no opportunity to cross examine witnesses nor to introduce evidence to rebut that offered by the state.[4]

A widow's marriage certificate is admissible without authentication, its probative value being a question for the commissioner.[5]

A doctor's evidence, given as expert testimony, is incompetent where the doctor stated that he knew nothing about the subject,

98. Lefens v. Indus. Comm., 286 Ill. 32, 121 N. E. 182, 3 W. C. L. J. 246.

99. Rockefeller v. Indus. Comm., —Utah—, (1921), 197 Pac. 1038.

1. Freeman's Case, 233 Mass. 287, 123 N. E. 845, 4 W. C. L. J. 498.

2. Southwestern Surety Ins. Co. v. Owens, —Tex. Civ. App.—, 198 S. W. 662, 17 N. C. C. A. 267.

3. Western Indem. Co. v. Wasco Land and Stock Co., —Cal.—, 197 Pac. 390.

4. Milne v. Sanders, —Tenn.—, (1921), 228 S. W. 702.

5. Smith v. Heine Safety Boiler Co., —Me.—, (1921), 112 Atl. 516.

nor the medical authorities concerning it, and had never examined a body which had been electrocuted.[6]

The testimony of a physician that the particular kind of hernia occurring in that portion of the body claimed was not possible, also testimony that persons on whom he had operated for hernia had never returned with a recurrence of the injury, that treatment for a hernia would give a certain effect and testimony relative to claimant's condition at the time of the hearing has been held admissible.[7]

A licensed chiropractor may testify as an expert, the probative value or weight to be given, depending upon the character, capacity, skill and opportunity to know.[8]

Weight and Sufficiency.

§ 520. **In General.**—It may be stated as a general rule that appellate courts will not inquire into the weight of conflicting evidence and determine where the preponderance lies. This does not conflict with the appellate courts' right to review the evience with a view to determining whether there is any competent evidence to sustain the award.[9]

Where it was sought to be shown that death was due to heart trouble brought on by accident, and the only evidence that death was due to this trouble was the death certificate, and this evidence was controverted by the physician who attended the deceased, the court said: "In order to sustain the award, the finding must rest upon a legal foundation. It cannot be presumed, but must be proved. The error of the commission consists in basing its conclusion solely on the unsupported and uncorroborated death certificate, which certificate, constituting only pre-

6. Sesser Coal Co. v. Indus. Comm., —Ill.—, (1921), 129 N. E. 536.
7. Schiller v. Baltimore & Ohio R. Co., —Md. App.—, 112 Atl. 272.
8. Voight v. Indus. Comm., —Ill.—, (1921), 130 N. E. 470.
9. Peoria Cordage Co. v. Industrial Board of Ill. et. al., 284 Ill. 90, 119 N. E. 996, 17 N. C. C. A. 245.

sumptive evidence, was conclusively overcome by the other evidence in the case."[10]

"The principal question presented is whether the findings are sustained by the evidence. As was pointed out in State ex rel. Neissen v. District Court, 142 Minn. 335, 172 N. W. 133, a question of law arises on the evidence introduced in a proceeding under the Workmen's Compensation Act only where an impartial consideration thereof, together with all reasonable and fair inferences, will lead reasonable minds to but one conclusion. If reasonable minds may reach different conclusions, the question becomes one of fact, and the findings must be sustained, for the reason that when reviewed in this court the sufficiency of the evidence to support them must be treated as a question of law under the express terms of the act. Section 8225, G. S. 1913, Minnesota."[11]

"There is testimony in the record tending to establish that the employees of the plaintiff in error were in the habit of using the fire escape on the elevator as a means of descent from the bin room, and that such use was known to the plaintiff in error. There is also in the record evidence tending to show that the fire escape was a safe means of descent. It appears that the day's work of the deceased and other employees was not completed until they had descended from the bin room and turned in their names and numbers to the timekeeper. There is therefore evidence in the record tending to establish that the injury arose out of and in the course of the employment of the deceased, and the Industrial Commission was justified in so finding."[12]

"It is the duty of the Industrial Commission to consider all the evidence in a hearing of this kind and to render its decision in accordance with the preponderance of the evidence. It should not grant an award merely because there is evidence in the re-

10. Nestor v. Pabst Brewing Co., 191 App. Div. 312, 181 N. Y. S. 477, 6 W. C. L. J. 85.

11. State ex rel. Berquist v. District Court of Beltrami County, 145 Minn. 127, 176 N. W. 165, 5 W. C. L. J. 549.

12. Stephens Engineering Co. v. Indus. Comm., 290 Ill. 88, (1919), 124 N. E. 869, 5 W. C. L. J. 205.

cord which tends to support that award, nor should it speculate upon a possible state of facts which does not reasonably appear to exist from the evidence. We have said with tiresome regularity that we cannot weigh the evidence, but must confirm the decision of the Industrial Commission if there is any competent evidence in the record which justifies its finding. Western Electric Co. v. Industrial Com., 285 Ill. 279, 120 N. E. 774; Peoria Terminal Co. v. Industrial Board, 279 Ill. 352, 116 N. E. 662."[13]

"As to the contention that plaintiff's injury was self-inflicted to evade military service, there is some evidence in the record to the effect that he had made remarks indicating a purpose to pursue such a course; but, upon weighing it in connection with all the other proof and circumstances, the lower court apparently reached the conclusion that this defense was not sustained. After a careful consideration, we are not disposed to disagree with him. In our view it would require very strong proof to establish that one who had nerve enough to place his hand against a circular saw and have all the fingers cut off would not be willing to take his chances in the military service."[14]

An issue of fact must be determined from the circumstances of the particular case presented.[15]

The court, in holding that there was evidence of notice to the employer, said: "The record shows, without contradiction, that the forelady of the department in which Franckina worked knew that his hand was hurt, and it is also manifest from her testimony that she understood it had been hurt in the factory while the deceased was engaged in his work for plaintiff in error. Actual notice supplies any deficiency in the notice if it is within the time prescribed and is to the principal, vice principal, or agent. Under the reasoning of this court in Parker-Washington Co. v. Industrial Board, 274 Ill. 498, 113 N. E. 976, and Wabash Rail-

13. McGarry v. Indus. Comm., 290 Ill. 577, 125 N. E. 318, 5 W. C. L. J. 372; Bekkedal Lumber Co. v. Indus. Comm., 168 Wis. 230, 169 N. W. 561, 3 W. C. L. J. 212, 17 N. C. C. A. 247, 952.

14. Smith v. White, 146 La. 313, (1920), 83 So. 584, 5 W. C. L. J. 531.

15. American Smelting & Refining Co. v. Cassil, 104 Neb.—, (1920), 178 N. W. 639, 5 W. C. L. J. 552.

way Co. v. Industrial Com., 286 Ill. 194, 121 N. E. 569, the knowledge of the forelady must be held to be notice to plaintiff in error. Moreover, the record shows that a written notice was served on plaintiff in error not later than July 28, 1917. Under the evidence in the record we think the Industrial Board was justified in holding that this notice was within 30 days of the accident. The facts in this case on this point plainly distinguish it from the case of Bushnell v. Industrial Board, 276 Ill. 262, 114 N. E. 496, relied on by counsel for plaintiff in error."[16]

Where the undisputed evidence showed that the injury occurred ¾ of a mile from the plant after the workman had "punched out" for the day, the court erred in refusing to find, as a matter of law, that the injury occurred on one of the public roads and not on the entrance to the plant on the employer's premises.[17]

The court, in holding that the evidence justified a finding that the disability was due to the injury and not to plaintiff's negligence in failing to secure medical attention, said: "There is no dispute as to what occurred. He went promptly enough to the defendant's doctor, who gave him all the treatment deemed necessary; when he found himself unable to leave his bed the following day, he certainly used reasonable efforts to procure the attendance of Dr. Lewis, and, failing in that, immediately called in a competent physician. When he failed to get relief, he discharged that physician and called another. It would be a strange doctrine to hold that this man, unable to speak our language, is to be held guilty of negligence because doctors called as expert witnesses failed to agree as to what was the proper medical treatment for his injury. The mere fact that Dr. Lewis found him in bed several days after the injury with no dressing or bandage upon his hand and arm does not tend to show that the plaintiff was negligent in procuring proper medical attention. Three physicians had failed to bring him relief, and it is not strange

16. Hydrox Chemical Co. v. Indus. Comm., 291 Ill. 579, (1920), 126 N. E. 564, 5 W. C. L. J. 811.

17. American Indemnity Co. v. Dinkins, —Tex. Civ. App.—, (1913), 211 S. W. 949, 4 W. C. L. J. 294.

that in his suffering he was found with no bandages or dressing upon his arm."[18]

Under the New Hampshire Act, evidence of contributory negligence is admissible as a defense. The court said: "The provisions of the statute entitled the plaintiff to recover, if his injury was due to accident arising out of and in the course of his employment, and caused, in whole or in part, by the negligence of any of his employer's officers, servants, or employees, unless it was made to appear by a preponderance of evidence that his own negligence contributed. The verdict should therefore have been allowed to stand, if there was any evidence upon which it could be found that the fellow servant's negligence caused the plaintiff's injury, and that his own negligence did not contribute thereto."[19]

Where the evidence tends to show that deceased was struck by an engine at a point where there was much travel to and fro and where he would very naturally be crossing the track on his way home, it cannot be said that the finding as to the cause of the accident was based on mere conjecture.[20]

Where a servant's death was caused by using a safety appliance other than the one prescribed, and the evidence showed that the refusal amounted to negligence and not to wilful misconduct, the finding that the injury arose out of the employment was justified.[21]

The board is at liberty to refuse to give credence to any portion of the evidence which in its opinion is not entitled to credence, nor are they required to give credence to the greater amount of evidence as against the lesser.[22]

18. Dobish v. Cudahy Packing Co., 101 Kan. 764, 171 Pac. 915, 18 N. C. C. A. 666, 2 W. C. L. J. 63.

19. Pellerin v. International Cotton Mills, —C. C. A. —, 248 Fed. 242, 2 W. C. L. J. 3.

20. Ewig v. Chicago, M. & St. P. Ry. Co., 167 Wis. 597, 167 N. W. 442, 2 W. C. L. J. 193.

21 Haskell & Barker Car Co. v. Kay, —Ind. App.—, 119 N. E. 811, 2 W. C. L. J. 466.

22. Schlehuber v. American Express Co., 230 Mass. 347, 119 N. E. 828, 2 W. C. L. J. 518; Santa Ana Sugar Co. of Santa Ana v. Ind. Acc. Comm.

The Liability of State Insurance Fund is in all respects the same as any other insurance carrier, and the method of establishing its liability, the manner of proof, and the evidence required are the same.[23]

An award based entirely upon hearsay evidence of the happening of the accident cannot be sustained.[24]

If the evidence is of such a nature that reasonable minds may reach different conclusions, the question of the sufficiency of the evidence becomes one of fact, and the findings of the trial court thereon will be sustained.[25]

Where a foreman was present at the time of the injury to claimant, and although he and the injured employee did not think that the injury was of sufficiently serious consequence to warrant giving notice, still after the workman returned from the physician the foreman was conscious of the fact that the employee was still suffering from pain, there was therefore sufficient evidence to justify a finding that the foreman had knowledge of the injury, even though it was thought that the injury was slight, such knowledge was actual notice to the employer.[26]

35 Cal. App. 652, 170 Pac. 630, 1 W. C. L. J. 745, 17 N. C. C. A. 876.

23. Fischer v. Genessee Const. Co., 187 App. Div. 850, 176 N. Y. S. 86, 4 W. C. L. J. 279.

24. Belcher v. Carthage Mach. Co., —N. Y. App. Div.—, 120 N. E. 735, 3 W. C. L. J. 166, 17 N. C. C. A. 259; McCauley v. Imperial Woolen Co., 261 Pa. 312, 104 Atl. 617, 2 W. C. L. J. 930, 17 N. C. C. A. 545; Employers' Ass'n Corp. v. Indus. Acc. Comm., 170 Cal. 800, 151 Pac. 423, 10 N. C. C. A. 550.

25. State ex rel. Niessen v. District Court, 142 Minn. 335, 172 N. W. 133, 4 W. C. L. J. 109; State ex rel. London & Lancashire Indemnity Co. of America v. District Court, 141 Minn. 348, 170 N. W. 218, 18 N. C. C. A. 576, 3 W. C. L. J. 337; Shell Co. of Cal. v. Indus. Acc. Comm. 36 Cal. App. 463, 172 Pac. 611, 2 W. C. L. J. 34, 16 N. C. C. A. 552; Zietlow v. Smock, 64 Ind. App.—, 117 N. E. 665, 1 W. C. L. J. 174, 15 N. C. C. A. 495; Gray v. Indus. Comm., 34 Cal. App. 713, 168 Pac. 702, 1 W. C. L. J. 151, 18 N. C. C. A. 305, 917; Underhill v. Central Hospital for the Insane, 64 Ind. App.—, 117 N. E. 870, 1 W. C. L. J. 360, 18 N. C. C. A. 294, 467; Nagy v. Solvay Process Co., 201 Mich. 158, 166 N. W. 1033, 1 W. C. L. J. 1049, 16 N. C. C. A. 806.

26. Leadbettor v. Indus. Comm., 179 Cal. 468, 177 Pac. 449, 3 W. C. L. J. 414, 18 N. C. C. A. 382; Vandalia Coal Co. v. Holtz, —Ind. App.—, 120 N. E. 386, 2 W. C. L. J. 880, 17 N. C. C. A. 88.

Where a foreman was told at the time of the accident that deceased had been struck by a rolling barrel and hurt, and later deceased's widow went to the office to draw his pay, notifying the employer that her husband was injured, the court held that a finding that the employer received notice, was justified by the evidence.[27]

"The principal defense urged by the defendants is that plaintiff did not file his claim within the six months provided by the statute (Michigan Pub. Acts (Ex. Sess.) 1912, No 10.) Plaintiff concedes that his claim was not filed within the six-months period, but excuses the delay on the ground that during his stay at the Herman Keefer Hospital he was incapacitated, both physically and mentally.

"The testimony discloses that during plaintiff's stay at the Herman Keefer Hospital he was in quarantine and confined to his bed until the last day or two, when he was placed in a wheel chair; that during a considerable portion of the time he was in great pain, and much of the time he was delirious. It further shows that he was cut off completely from the outside world, and saw only the nurses and doctors. No letters could go out without special permission. On one occasion his brother was permitted to enter the room where he was, and remain five minutes, but before doing so was required to don an oilcloth robe, and just before leaving the hospital his landlady came and talked with him through the window. Most of the time he was too weak to read or write. His testimony indicates that during the time his mind was more or less in a mental haze, as he could remember little that took place in connection with this case. We are of the opinion that the testimony discloses a state of facts which fully justified the board in making the finding which it did. If this state of facts would not furnish a basis for the finding that he was physically and mentally incapacitated within the meaning of the exception

27. G. H. Hammond Co. v. Indus. Comm., 288 Ill. 262, (1919), 123 N. E. 384, 4 W. C. L. J. 176.

to the statute, it would be difficult to conceive a situation that would."[28]

The party having the burden of proof may establish his case by circumstantial evidence the same as in other cases; but if inferences in favor of the applicant can be arrived at only by conjecture or speculation, or if the inferences are equally compatible with two or more findings, the applicant cannot recover.[29]

An agreement to pay compensation after an accident is competent evidence on the issue of whether there was an accident and liability for compensation, but it is not conclusive.[30]

Where an employee placed his hand in a position where he had been forbidden to place it, and as a result he lost his hand, and the evidence showed that the cause of the employee disobeying the instruction was his defective eyesight which prevented him from judging distances, the court held that the employer had not established such willful misconduct on the part of the employee as would defeat a recovery.[31]

Where it was claimed that an employee contracted arsenical poisoning from smelting zinc, and the evidence showed that for fifty years a case of such poisoning, never had occurred in this particular line of work and such disease if it did occur would have been considered an occupational disease, for which the act does not give

28. Corkin v. River Raisin Paper Co., 206 Mich. 488, 173 N. W. 204, 4 W. C. L. J. 411.

29. Ginsberg v. Burroughs Adding Machine Co., 204 Mich. 130, 170 N. W. 15, 3 W. C. L. J. 317, 18 N. C. C. A. 314; Flucker v. Carnegie Steel Co., —Pa.—, (1919), 106 Atl. 192, 3 W. C. L. J. 780, 18 N. C. C. A. 1056; Murphy's Case, 230 Mass. 99, 119 N. E. 657, 2 W. C. L. J. 270, 18 N. C. C. A. 302; Meyers v. Michigan Cent. R. Co., 199 Mich. 134, 165 N. W. 703, 1 W. C. L. J. 402, 15 N. C. C. A. 277; Bryant v. Fissell, 84 N. J. L. J. 72, 3 N. C. C. A. 585; Zabriskie v. Erie Ry. Co., 85 N. J. L. 157; 4 N. C. C. A. 778.

30. Burns v. Edison, 92 N. J. L. 288, 105 Atl. 717, 3 W. C. L. J. 645, 18 N. C. C. A. 745, 747, 752.

31. Peru Basket Co. v. Kuntz, —Ind. App.—, (1919), 122 N. E. 349, 3 W. C. L. J. 627.

compensation, there was no evidence to support a finding that the accident arose out of the employment.[32]

Where the evidence showed that the only notice the employer received was that given by the injured employee at a time which he estimated to be from one to two months after the accident, the evidence would not justify a finding that notice was given within 30 days.[33]

Reasonable inferences may be drawn from established facts and circumstances shown by the evidence.[34]

Where the evidence showed that prompt action was necessary in securing medical attention, a finding that the employee was justified in securing such attention before notifying the employer, was warranted.[35]

To justify an award, the party having the burden of proof must have the greater weight of the evidence preponderating in his favor.[36]

Admission of hearsay evidence will not justify the reversal of an award, where there was competent evidence sufficient to sustain the award.[37]

The board not only passes on the credibility of witnesses, but draws its inferences from the circumstances and facts which it finds established.[38]

32. Matthiessen & Hegeler Zinc Co. v. Indus. Bd., 284 Ill. 378, 120 N. E. 249, 8 W. C. L. J. 875, 17 N. C. C. A. 342, 788.

33. Barrett Co. v. Indus. Comm., 288 Ill. 39, 123 N. E. 29, 4 W. C. L. J. 43.

34. Hege & Co. v. Tompkins, —Ind. App.—, 121 N. E. 677, 3 W. C. L. J. 451; Nordyke & Marmon Co. v. Swift et al., —Ind. App.—, (1919), 123 N. E. 449, 4 W. C. L. J. 179.

35. Gage v. Board of Control of Pontiac State Hospital, 206 Mich. 25, (1919), 172 N. W. 536, 4 W. C. L. J. 247.

36. Joseph-Halsted Co. v. Indus. Comm., 287 Ill. 509, (1919), 122 N. E. 822, 4 W. C. L. J. 24.

37. Huskell & Barker Car Co. v. Brown, 64 Ind. App.—, 117 N. E. 555, 1 W. C. L. J. 48, 18 N. C. C. A. 232, 305; Kinney v. Cadilac Motor Car Co., 109 Mich. 435, 165 N. W. 651, 1 W. C. L. J. 395, 15 N. C. C. A. 586; Fitzgerald v. Lozier Motor Co., 187 Mich. 660, 154 N. W. 67.

38. Meyers v. Mich. Central R. Co., 199 Mich. 134, 165 N. W. 703, 1 W. C. L. J. 402, 15 N. C. C. A. 277.

Where there was no dispute as to the evidence the conclusions drawn therefrom are subject to review by the court.[39]

The opinion of medical experts that death was due to an injury arising out of and in the course of the employment is sufficient to sustain an award.[40]

§ 521. **Relation of the Parties.**—Where an employer wrote a letter to his employee informing him that his request for an increase of salary could not be conceded and asking him to look up another job, but further stated that if he would continue the work until a man could be obtained that he could continue to live in the house without charge, this was held to be sufficient evidence that the relation of employer and employee had not terminated.[41]

Where the evidence shows that the employer was a plasterer contractor and that his wife had signed two pay checks of the employee's, the court held that such evidence was insufficient to establish any relation that would make the husband's employee the employee of the wife as well, and to hold otherwise would be merely basing the finding upon conjecture.[42]

Where a contractor sublet a contract for doing certain excavating, and later the plans were revised adding additional work, and the subcontractor agreed to do this work at cost, and it was on this work that deceased was killed, the court held that the fact that the additional work was done at cost did not change the relation which existed between the original contractor and the subcontractor, and the injured employee was

39. Baron v. National Metal Spinning and Stamping Co, 182 N. Y. 284, 169 Supp. 337, 1 W. C. L. J. 867, 18 N. C. C. A. 313, 462.

40. Santa v. Indus. Comm., 175 Cal. 235, 165 Pac. 689, 17 N. C. C. A. 260; Blackburn v. Coffeyville Vitrified Brick & Tile Co., —Kan.—, (1920), 193 Pac. 351, 7 W. C. L. J. 58.

41. Krobitzsch v. Indus. Acc. Comm., —Cal.—, 185 Pac. 396, 5 W. C. L. J. 136.

42. Lezala v. Jazek, 170 Wis. 532, 175 N. W. 87, 5 W. C. L. J. 338; Goff's Case, —Mass.—, 125 N. E. 145, 5 W. C. L. J. 252.

therefore an employee of the subcontractor and not covered by the employer's insurance policy.[43]

Proof that an injury occurred at or near the place claimant would be while engaged in the performance of his duty in connection with interstate commerce, is not inconsistent with his being in the performance of his general duties of watchman, which would bring him within the state act.[44]

Where the evidence showed that deceased drove a team for defendant and hired any help needed, paying them out of the moneys he collected, and in the evening the defendant divided the net proceeds of the day with deceased, the court held that in view of the foregoing facts, together with the fact that the defendant had entire control of the business and directed de ceased where to go, and carried insurance upon him, reporting the accident and injury to the company, the commission was justified in finding that deceased was an employee and not a partner.[45]

Where the president of a corporation requests his son-in-law, who was a director and manager of a company which was to take over the president's personal business, to accompany him on a tour of inspection to witness the testing of a refrigerator tank in which the president intended to invest, and while there the son-in-law was killed, the court held that the fact that the deceased was there as a director of the company did not prevent him from being there in the personal interests of the president as well, and a finding that he was killed in the latter's employment was justified.[46]

"Where a person in the general employment of a contractor assists with a machine or other appliance belonging to the contractor, in the work of an employer to whom the servant is lent, the person so lent may become, with his consent, the servant

43. Worswick Street Paving Co. v. Indus. Acc. Comm., —Cal.—, 185 Pac. 953, 5 W. C. L. J. 342.

44. Atchison T. & S. F. R. Co. v. Indus. Comm., 290 Ill. 590, 125 N. E. 380, 5 W. C. L. J. 364.

45. Nissen Transfer & Storage Co. v. Miller, —Ind. App.—, (1920), 125 N. E. 652, 5 W. C. L. J. 519.

46. Newman v. Mankowitz, 93 N. J. L. 473, 108 Atl. 179, 5 W. C. L. J. 296.

of the special employer. Driscoll v. Towle, 181 Mass. 416, 63 N. E. 922; Shepard v. Jacobs, 204 Mass. 110, 90 N. E. 392, 26 L. R. A. (N. S.) 442, 134 Am. St. Rep. 648; Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737; Peach v. Bruno, 224 Mass. 447, 113 N. E. 279; Clancy's case, 228 Mass. 316, 117 N. E. 347; Scribner's Case, 231 Mass. 132, 120 N. E. 350.

"This presumption, however, may be overcome by evidence to the contrary; and the facts may be such as to warrant the finding that the owner of the machine has so far surrendered the right of control that even in this particular the person in charge of the machine has become the servant of the special employer. See in this connection Scribner's Case, supra; Cain v. Hugh Nawn Contracting Co., 202 Mass. 237, 88 N. E. 842."[47]

Evidence that deceased, a gatekeeper in the employ of the township, was killed the first night of his employment, is insufficient to establish that he was a casual employee.[48]

An express carrier that hires steam railways to transport its packages is a common carrier of express, but not a common carrier by steam railway within the meaning of the exemption of the Minnesota Act.[49]

Where the evidence showed that the employer retained the right to direct and control the manner of doing the work as well as the right to discharge claimant at will, the finding that claimant was an employee and not an independent contractor was supported by the evidence.[50]

Where the evidence showed that after an employee had been told to go home and sober up, he returned to the premises and was killed, the board held that in view of the fact that the evidence did not show that deceased knew of his discharge at the time he

47. Emach's Case, 232 Mass. 596, 123 N. E. 86, 4 W. C. L. J. 94.

48. Doherty v. Grosse Isle Twp., 205 Mich. 592, 172 N. W. 596, 4 W. C. L. J. 222.

49. State ex rel. Great Northern Express Co. v. District Court, 142 Minn. 410, 172 N. W. 310, 4 W. C. L. J. 262.

50. Western Indemnity Co. v. Prater, —Tex. Civ. App.—, (1919), 213 S. W. 355, 4 W. C. L. J. 455; Aisenberg v. C. F. Adams Co. Inc., —Conn. —, (1920), 111 Atl. 591, 7 W. C. L. J. 28.

first left the premises with another employee, who had been injured, that the relation of employer and employee had not ceased. The court said: "Pettit commenced work on the morning in question about 8 o'clock and was killed something like a half hour later. It is the claim of counsel for appellant that, when he left the bridge in company with Morgan, it was in obedience to the order of the foreman discharging him for the day, and that he returned to inquire whether he was finally discharged, and that therefore his injuries were received after his employment had terminated and after he had not only been allowed a reasonable time in which to leave, but after he had in fact left the premises. The record does not show conclusively that deceased left the premises with Morgan because he had been discharged, or that he may not have gone with Morgan on account of his injuries. It may be that the finding of the commissioner is not supported by the greater weight or preponderance of the evidence; but we cannot say, upon the record before us, that it is against the undisputed evidence, and proper inferences to be drawn therefrom."[51]

The claimant contracted to move an engine from the railroad to the plant for $225. He was then asked to assist with its installation, and while so doing was injured. The court, in holding that at the time of the injury he was an employee, said: "We think there is evidence to sustain the finding that the claimant when injured was an employee, and not an independent contractor. That he was a contractor while engaged in transporting the engine from the railroad to the mill may be conceded. But when that contract had been performed, he assumed a new relation. He was then employed by the day to work as a laborer with others. He was not in control of the job; he had no power of superintendence or direction; he had no other rank than the regular employees of the mill who were with him; he took his orders from the engineer whom the mill had placed in charge. In this situation, the distinctive tokens of the independent contractor are lacking. The claimant for the purposes of this job was an employee, and nothing more. What he may have been at other times and for other purposes does not concern us. It is true that his employ-

51. Paul v. Indus. Comm., 288 Ill. 532, 123 N. E. 541, 4 W. C. L. J. 371.

ment was temporary and casual, but that is not enough to exclude him from the protection of the statute. Matter of De Noyer v. Cavanaugh, 221 N. Y. 273, 116 N. E. 992. It is true also that he brought two of his own men with him; but he made no profit from their labor. His position was like that of the claimant in Thompson v. Twiss, 90 Conn. 444, 448, 449, 97 Atl. 328, L. R. A. 1916E, 506, where compensation was awarded. There are other cases of like tenor. Tuttle v. Embury Martin Lumber Co., 192 Mich. 385, 158 N. W. 875; Matter of Peake v. Lakin, 221 N. Y. 660, 117 N. E. 1087. McNally did not undertake to accomplish a specific job in his own way. He did not undertake to accomplish anything. He undertook to help and to obey."[52]

The fact that the person injured, at the time of the injury was engaged in underdressing a stone according to marks made thereon by the superintendent of the original contractor, would not of itself show that he was an employee and not a subcontractor, since the contract provided that work of such character was to be paid for at a certain rate per hour, not as wages, but as pay for work covered by its terms.[53]

"The court, in Kackel v. Serviss, 180 App. Div. 54, 167 N. Y. Sup. 348, laid down the rule, which must prevail until overruled, that the jurisdictional fact of a contract of employment must be established by due process of law, by evidence which would be required to establish any other contractual relation and that in the absence of such evidence no foundation was laid for the operation of the Workmen's Compensation Law. In that case we said:

" 'The question here is, not whether there is evidence to show that Davis was an independent contractor, but whether Scott Serviss entered into a contract for the employment of Norman J. Wesley, and there is absolutely no competent evidence of any such contract.'

52. McNally v. Diamond Mills Paper Co., 223 N. Y. 83, 119 N. E. 242, 2 W. C. L. J. 110, 16 N. C. C. A. 639.

53. Mobley v. J. S. Rogers Co., —Ind. App.—, 119 N. E. 477, 2 W. C. L. J. 47.

"That is the situation in the case at bar; there is no evidence whatever that Smith even entered into a contract for the employment of Tsangournos, and without this there is nothing for the Workmen's Compensation Law to operate upon, and the determination of the State Industrial Commission, not having support in the evidence is without effect." [54]

The fact that an employer does not exercise his right of control over a workman simply because the workman's knowledge of the task was superior to the employer's, will not justify a finding that the workman was an independent contractor.[55]

The court, in holding that deceased was an employee, irrespective of the fact that he had been employed on trial, said: "An 'employee' is defined in our Workmen's Compensation Act as 'every person in the service of another under any contract of hire, express or implied, oral or written.' Section 130. This provision or definition is to be construed broadly. In re Donovan, 217 Mass. 76, 104 N. E. 431.

"In our judgment Rice must be held to have been an employee. His continued employment depended upon his ability to drive a car, and he was put to work with the understanding that, if he was competent, he would be continued in that employment. It is unimportant that his name had not been placed upon plaintiff in error's pay roll. He was killed the first half day he worked and before any report had been made to Yager by Fritz as to his ability. Fritz testified Rice was capable, and, over objections, that he would have so reported. Yager testified he did not permit more than a day's trial to determine the competency of men to do that work. He further testified that, if Rice had been reported competent, he would have paid him $15 per week (the wage agreed upon), commencing the morning of the day Rice went to work. Yager called on Rice's mother the evening after the accident and admitted there was a half day's wage due her

54. Tsangournos v. Smith, 183 N. P. App. Div. 751, 171 Supp. 256, 2 W. C. L. J. 686, 17 N. C. C. A. 698; City of Chicago v. Indus. Comm., — Ill.—, 128 N. E. 524, 7 W. C. L. J. 37.

55. Rosedale Cemetery Assn. v. Indus. Comm., 37 Cal. App. 706, 174 Pac. 351, 2 W. C. L. J. 754, 17 N. C. C. A. 389, 688.

son. The evidence was sufficient to sustain the conclusion of the board that the accident arose out of and in the course of Rice's employment. Dietzen Co. v. Industrial Board, 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B, 764; Ohio Building Safety Vault Co. v. Industrial Board, 277 Ill. 96, 115 N. E. 149. The employment was not casual, within the meaning of that term as defined in Aurora Brewing Co. v. Industrial Board, 277 Ill. 142, 115 N. E. 207, and In re Gaynor, 217 Mass. 86, 104 N. E. 339, L. R. A. 1916A, 363."[56]

Where a firm hired a party to work for an undisclosed principal, and the hired employee was ignorant of any third party, but considered the immediate firm his employer, he may, upon discovery of the undisclosed principal, hold him or the firm which employed him, and an election to hold the firm will constitute him their employee for the purpose of recovering compensation.[57]

The court, in holding that the injured person was an employee, said: "The evidence embodied in the record indicates that it was a necessary part of petitioner's business to keep the rooms and hallways of her lodging house in a state of cleanliness and good order. A chambermaid was employed continuously. The maid was, however, not able to do all the work, and her efforts had to be supplemented by a man called in from time to time. The work for which Robinson was engaged was taking up of carpets or matting, and the cleaning off walls, transoms, windows, and curtains. Miss Walker herself testified that she was in the habit of employing some one to do that kind of work occasionally, and the chambermaid stated that ever since Robinson's injury another man had been doing similar work off and on. This testimony warranted the conclusion that the employment of Robinson was in the 'usual course of the business' of the petitioner.

"In cases arising under that act the expression 'course of business of the employer' is held to cover the normal operations which form part of the ordinary business carried on, and not to

56. Marshall Field & Co. v. Indus. Comm., 285 Ill. 333, 120 N. E. 773, 3 W. C. L. J. 105, 18 N. C. C. A. 134, 909.

57. Scott v. O. A. Hankinson & Co. et al., 205 Mich. 353, 171 N. W. 489, 3 W. C. L. J. 759, 18 N. C. C. A. 917.

include accidental and occasional operations having for their purpose the preservation of the premises or the appliances used in the business.''[58]

Where the evidence disclosed that the owner of a house let the contract of painting to a party and he in turn hired helpers, the helpers injured on the job of painting are not employees of the owner of the house and cannot look to him for compensation.[59]

The relation of the parties cannot be established by hearsay evidence.[60]

The fact that one hires help, collects their wages and pays it to them is insufficient to establish that he is an independent contractor.[61]

Testimony by the claimant that he was employed by a particular company and paid by it, is sufficient to establish the relation of employer and employee in the absence of evidence to the contrary.[61]

The marriage of claimant to the deceased employee need not be proved by documentary or record evidence, it being sufficient if marriage is shown by reputation, the testimony of witnesses, by circumstances, or the uncontradicted testimony of claimant that they had been married, lived together and reared a family.[62]

The exclusion of a pay roll book of another company, made out by a bookkeeper, and which deceased did not see nor sign, was proper, in a proceeding to establish the relation of the parties.[63]

58. Walker v. Indus. Acc. Comm., 177 Cal. 737, 171 Pac. 954, 2 W. C. L. J. 29, 18 N. C. C A. 141, 296.

59. Kackel v. Serviss, 180 App. Div. 54, 167 N. Y. S. 348, 1 W. C. L. J. 235.

60. Connolly v. Indus. Comm., 173 Cal. 405, 160 Pac. 239, 14 N. C. C. A. 431.

61. Spencer v. Marshall, — Kan. —, (1920), 191 Pac. 468, 6 W. C. L. J. 529.

61. Rockford City Traction Co. v. Indus. Comm., —Ill.—, (1920), 129 N. E. 135, 7 W. C. L. J. 283.

62. Western Coal & Mining Co. v. Indus. Comm., —Ill.—, (1921), 129 N. E. 779.

63. Alaska Treadwell Gold Mining Co. v. Crinis, (1919), 167 C. C. A. 138 (Alaska).

Where the facts are undisputed, the question whether the relation of employer and employee existed, is one of law.[64]

§ 522. **Acceptance or Rejection of the Statute.**—The court, in holding that the defendants were operating under the act, said: "It is contended by Ellsworth & McNair that the letter to the Industrial Board did not show an election by them to come under the act in force at the time the accident occured; their claim being that at the time the letter was written the act of May 1, 1912 (Laws 1911, p. 315), had been repealed by the act which went into effect July 1, 1913. Whether or not Ellsworth & McNair were under the act is a question of fact, to be determined from all the circumstances connected with the transaction. It is well to note in this connection that the Industrial Board was created by the Act of 1913. The election by Ellsworth & McNair to come under the Compensation Act, was made by a letter addressed by them to this Industrial Board. According to a memorandum appearing on the bottom of their letter, which is on file with the Industrial Board, a copy of the act of 1913 was mailed to them. They carried liability insurance, and when Jefferson was injured the insurance company paid him compensation in accordance with the terms of the act. When the settlement was made, they required that it be approved by the Industrial Board. Considering all the evidence, it cannot be said that there is no evidence justifying the finding of the Industrial Board that Ellsworth & McNair were operating under the Compensation Act in force at the time of the accident. There being evidence in the record which did justify this finding, we must hold that the circuit court erred in setting aside the decision of the Industrial Board. Swift & Co. v. Industrial Com., 287 Ill. 564, 122 N. E. 796; Big Muddy Coal Co. v. Industrial Board, 279 Ill. 235, 116 N. E. 662."[65]

Where the Industrial board had not adopted any set form for giving notice of election to reject the provisions of the act, any

64. Rockefeller v. Indus. Comm., —Utah—, (1921), 197 Pac. 1038.

65. Ellsworth v. Indus. Comm., —Ill.—, (1919), 125 N. E. 246, 5 W. C. L. J. 180.

writing which informs the board of an employer's intention to reject the act is sufficient, and where the preponderance of the evidence shows that notices have been posted about the employer's premise, a finding that the employer complied with the provisions of the act in this respect, is warranted.[66]

Where the evidence showed that the employee had received no notice, either actual or constructive, of the employer's acceptance of the provisions of the act, which is a prerequisite to relieving the employer of his common law liability, the employer's acceptance of the act is nugatory as to the plaintiff.[67]

Under the Illinois act a servant or master wishing to avoid the operation of the act, must show not only that the master has so notified the Industrial Board, but also that the servant had received a copy thereof, or that a copy had been posted where he was employed.[68]

Where the injured servant has shown that at the time of the injury he was engaged in work to which the compensation act was applicable, he need not offer evidence to show that the defendant had not rejected the act, since this is a matter peculiarily within the knowledge of the defendant, and the burden of proving his rejection of the act rests upon the defendant.[69]

§ 523. **As Establishing that Injury Arose Out of and in the Course of the Employment.**—Where the commission found that

66. A. T. Willett Co. v. Indus. Comm., — Ill. —, (1919), 122 N. E. 864, Parole rejection not recognized in Nebraska. Nedela v. Mares Auto Co., — Neb. —, 184 N. W. 885.

67. Farmer's Petroleum Co. v. Shelton, — Tex. Civ. App. —, 202 S. W. 194, 2 W. C. L. J. 138, 17 N. C. C. A. 477.

68. Beveridge v. Illinois Fuel Co., —Ill.—, 119 N. E. 46, 1 W. C. L. J. 958, 17 N. C. C. A. 463, 526; Barnes v. Illinois Fuel Co., — Ill. —, 119 N. E. 48, 1 W. C. L. J. 962, 17 N. C. C. A 476; Palmieri v. Ill. Third Vein Coal Co., 208 Ill. App. 405, 17 N. C. C. A. 476; Synkus v. Big Muddy Coal & Iron Co., 190 Ill. App. 602, 17 N. C. C. A. 476; Salvuca v. Ryan & Reilly Co., 129 Md. 235, 98 Atl. 675, 17 N. C. C. A. 477; Farmers' Petroleum Co. v. Shelton, — Tex. Civ. App. —, 202 S. W. 194.

69. Spilene v. Salmon Falls Mfg. Co., — N. H. —, (1920), 108 Atl. 808, 5 W. C. L. J. 550. See Chapter VI.

a certain accident was the cause of encephalitis, which would necessarily involve a finding that claimant suffered a fractured skull, such a finding was not sustained where there was no evidence that the disease was caused by a fractured skull.[70]

"The referee found from the testimony of the physicians that the natural course of carcinoma is gradual and slow, and that, though the evidence showed that before the accident decedent was suffering from this disease, its development had not reached the stage to cause him inconvenience and was not noticeable. He further found the development after the accident was not such as would have been expected without an intervening cause which might be supplied by a local injury to the affected part. The further finding followed that, since the beginning if the rapid growth was coincident with the happening of the accident, and there was nothing in the evidence to indicate another cause, the conclusion was that death resulted from the accident. While the testimony of the physicians is not before us, it sufficiently appears in the findings that the referee did not act without proper evidence as the basis of his conclusion that decedent's premature death was caused by a pre-existing disease aggravated by the accident. The objection that absence of a finding that death was hastened by the accident is sufficiently answered by the tenth finding, that 'this rapid development continued and progressed until it finally caused the decedent's death.' "[71]

Where the evidence tended to establish that an employee was injured while on the premises of his employer, en route to catch a train furnished by the employer for the employee's accommodation in leaving the mine, the court held that such evidence was sufficient to establish that the injury occured by reason of spe-

70. Donovan v. Alliance Electric Co., 191 App. Div. 303, 181 N. Y. Supp. 823, 6 W. C. L. J. 77.

71. Whittle v. National Aniline & Chemical Co., —Pa.—, (1920), 109 Atl. 847, 6 W. C. L. J. 103; State Indus. Comm. v. Hires Condensed Milk Co., 184 N. Y. S. 402, (1920), 7 W. C. L. J. 132.

72. Indian Creek Coal & Mining Co. v. Wehr, — Ind. App. —, (1920), 127 N. E. 202, 6 W. C. L. J. 31; Indian Creek Coal & Mining Co. v. Wehr,

cial hazards incident to the work which it was his duty to perform.[72]

Where it was sought to be shown that infection resulted from scraping an injured finger with a knife, but without causing a break in the skin, it was held that in view of testimony of physicians to the effect that an incision would be necessary before an infection could follow, a finding that the loss of the finger was due to the original injury and not to the employee's act, was sustained by the evidence.[73]

"Claimant testified that he did not know definitely just what caused the pain or injury, but he believed it was caused by the constant use of a screwdriver, 'as is first stated,' evidently referring to the statement in his affidavit referred to; that the pain was several days coming on; that at no time did he get a splinter in his hand or any particle of grit or anything that was ground in his hand from the screwdriver, but he thought it was just from its continual use; that it bruised the flesh; that at times he fastened a pin in the jamb, and then would set his screwdriver there and hit it with his hand; that his hand felt tender at the time, but that he had never had anything like this.

"This testimony was insufficient to show that the injury was caused by accident. An accidental event takes place without one's foresight or expectation; an event that proceeds from an unknown cause, or is an unusual effect of the known cause, and therefore not expected. Paul v. Travelers' Insurance Co., 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758, 14 R. C. L. Sec. 418, p. 1238.

"It is quite clear that the evidence to which reference has been made was insufficient to establish the conclusion of fact found by the Industrial Commission—that the frog felon resulted from the use of the screwdriver, which bruised the palm of the right hand. Matter of Belcher v. Carthage Machine Co., 224 N. Y. 326,

—.Ind. —, (1920), 128 N. E. 765, 7 W. C. L. J. 47; Cent. Const. Co. v. Harrison, — Md. App. —, 112 Atl. 627, (1921).

73. Challenge Co. v. Indus. Comm., —Ill.—, (1920), 127 N. E. 832, 6 W. C. L. J. 14.

120 N. E. 735; Matter of Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 540."[74]

Evidence that a printer was found on a concrete floor by other employees when they returned from lunch; that his skull was fractured; that he was lying between two rolls of paper, and that there were other obstructions over which he might have tripped, in an odor-and gas-impregnated dark room, sufficiently justified an award.[75]

Where the medical experts differed widely as to the cause of death, and other evidence was conflicting, a finding that death was due to an accident arising out of and in the course of the employment will not be disturbed on appeal.[76]

Where the evidence showed that the injured employee had been suffering from a hernia, but that a second hernia resulted from a strain, and was not caused by the old hernia, a finding that the injury arose out of the employment will be sustained.[77]

Where the evidence was to the effect that claimant's neuralgic pain or disease was due to a faulty posture and that any other occupation was likely to cause the same pain from which claimant was suffering, it cannot be said that the pain or disease was an injury covered by the act. "While the act should be construed liberally, it should not be extended to cases which cannot reasonably be interpreted as within its scope. The statement in Maggelet's Case, supra, 228 Mass. at page 61, 116 N. E. at page 973, L. R. A. 1918F, 864, that 'No case has gone so far as to hold

74. Woodruff v. R. H. Howes Const. Co., —App. Div.—, (1920), 127 N. E. 270, 6 W. C. L. J. 72; Gale v. Monroe, 184 N. Y. S. 413, 7 W. C. L. J. 106; State Indus. Comm. v. Downey-Snell Logging Co., 184 N. Y. S. 417, (1920), 7 W. C. L. J. 129; In re Geo. R. Foster, 2nd A. R. U. S. C. C. 221.

75. Graffe v. Art Color Printing Co., —App. Div.—, (1920), 181 N. Y. S. 707, 6 W. C. L. J. 81; Star Piano Co. v. McIlvain, —Pa.—, (1919), 106 Atl. 785, 4 W. C. L. J. 453; Paton v. Port Huron Engine and Thresher Co., —Mich.—, (1921), 182 N. W. 639.

76. Amalgamated Sugar Co. v. Indus. Comm., —Utah—, (1920), 189 Pac. 69, 6 W. C. L. J. 112; Levitan Embroidery Works v. Lamatina, 111 Atl. 648, (1920), 7 W. C. L. J. 87.

77. U. S. Fidelity & Guar. Co. v. Ross, —Tex. Civ. App.—, (1920), 221 S. W. 639, 6 W. C. L. J. 219.

that a "neurosis of the nerves" supplying certain muscles, resulting from a posture which causes the employee "to bend forward with shoulders forward" so as to induce "pressure on the brachial plexus" is a personal injury,' applies in principle to the case at bar, although the employee is not suffering from neurosis, and notwithstanding the finding of the board that as a result of the muscular movements required in rolling cigars acting upon this particular condition neuralgic pain developed. It follows that the decree must be reversed, and a decree entered in favor of the insurer."[78]

Where the trial court found that death was due to a disease known as Hodgkin's disease, which resulted from ulcerations of the mucous membrane of the nose, and that these ulcerations were caused by inhaling the fumes of hydrochloric acid used by the deceased in the performance of his duties as a tinner, the court on appeal held that such a finding was not supported by the evidence, for, hydrochloric acid is constantly used by tinners and is shown to be sterile, and is not known to cause any disease, while on the other hand the cause and origin of Hodgkin's disease is unknown. There was no causal connection shown between the origin of this disease in the present case and the use of the hydrochloric acid.[79]

Where the evidence showed that claimant was suffering from choroiditis prior to the accident, which would destroy the sight of the eye at any time, and medical testimony was to the effect that the loss of the eye was due to the disease and not to the injury, there was no evidence to justify a finding that the accident arose out of the employment.[80]

Where there was no evidence consistent with the happening of an accident or that claimant's hernia was due to an accident,

78. Pimental's Case, — Mass. —, (1920), 127 N. E. 424, 6 W. C. L. J. 185.

79. State ex rel. Johnson Hdw. Co. v. District Ct. of Carver County, — Minn. —, (1920), 177 N. W. 644, 6 W. C. L. J. 189.

80. Spring Valley Coal Co. v. Indus. Comm., — Ill. —, (1919), 124 N. E. 545, 5 W. C. L. J. 64.

a finding that the disability was the result of an accidental injury arising out of the employment cannot be sustained.[81]

Where an employee was injured in the course of his employment as the result of an assault, evidence of the comparative size of the participants and who was the aggressor has little bearing upon the question whether the assault arose out of the employment. But evidence that the assault grew out of matters connected with the injured employee's work was pertinent.[82]

Evidence that the time which elapsed between the time when the employee first noticed symptoms of being affected by the sun's rays and the time he collapsed, was unappreciable, affording him no time to leave the place, would warrant a finding that his injury was due to the conditions of the employment.[83]

Where the purpose of the act was to exempt persons engaged as common carriers by steam from the operation of the act, evidence that an express company only hired the railroad company to transport its parcels, would not make it a common carrier by steam. So an injury to one of its employees while attending to a call of nature, during working hours under a box car, because facilities provided were too far from the place of work, will justify a finding that the injury arose out of the employment so as to entitle him to compensation.[84]

Evidence that the injury was the producing cause of the death is sufficient to justify a finding that death was due to an injury arising out of the employment, it is not necessary to prove that the injury was the proximate cause.[85]

81. Matoris v. Estey Piano Co., — App. Div. —, 178 N. Y. S. 408, (1919), 5 W. C. L. J. 102; Hager v. Griffin Mfg. Co., 184 N. Y. S. 750, (1920), 7 W. C. L. J. 108; State Indus. Comm. v. Amer. Hide and Leather Co., (1920), 184 N. Y. S. 808, 7 W. C. L. J. 126.

82. Swift & Co. v. Indus. Comm., — Ill. —, (1919), 122 N. E. 796, 4 W. C. L. J. 35.

83. McCarthy's Case, — Mass. —, (1919), 123 N. E. 87, 4 W. C. L. J. 96.

84. State ex rel. G. N. Express Co. v. District Court, — Minn. —, (1919), 172 N. W. 310, 4 W. C. L. J. 262.

85. Lundy v. Geo. Brown & Co., — N. J. —, (1919), 106 Atl. 362, 4 W. C. L. J. 119; Tanner v. Aluminum Castings Co., — Mich. —, (1920), 128

"There was no evidence that there was any fall of rock in the entry of the mine, or at any other place in the mine on July 22, 1917, or at any other time. It devolved upon the plaintiff to establish the fact that the deceased was not only injured in the manner claimed, but to produce evidence to show that he was injured by an accident that arose out of and in the course of his employment by the defendant. The law does not require that the case shall be established by direct evidence; circumstantial evidence is sufficient. But the circumstantial evidence must be such as would justify an inference that the injury was due to an accident arising out of and in the course of the employment, and must not be left to speculation or conjecture."[86]

Where evidence shows that hidden gonorrheal germs can be lighted up by a bruise, and because of the bruise received by claimant his disability was thereby prolonged, a finding that the extended disability was due to the accidental injury is supported by the evidence.[87]

Where it was shown in the evidence that an employee was injured when he attempted to fill a bottle from a bubble fountain, instead of drinking directly from the fountain as was intended, the court held that the accident was the result of an added risk and therefore did not arise out of the employment.[88]

N. W. 69, 6 W. C. L. J. 337; Kruger v. Hayes Mfg. Co., — Mich. —, (1921), 181 N. W. 1010.

86. Mayeur v. Crowe Coal & Mining Co., — Kan. —, (1920), 186 Pac. 1035, 5 W. C. L. J. 526; Brenner v. Heruben, — Wis. —, (1920), 176 N. W. 228, 5 W. C. L. J. 639; Hydrox Chemical Co. v. Indus. Comm., — Ill. —, (1920), 126 N. E. 564, 5 W. C. L. J. 811; Chicago Rawhide Mfg. Co. v. Indus. Comm.,—Ill.—, (1920), 126 N. E. 616, 5 W. C. L. J. 799; Western Grain & Sugar Products Co. v. Pillsbury, —Cal.—, 159 Pac. 423, 14 N. C. C. A. 430; Saunders v. New England Collapsible Tube Co.,—Conn.—, (1920), 110 Atl. 538, 6 W. C. L. J. 271; Michelon v. Century Metal Spinning and Stamping Co. 184 N. Y. S. 615, 7 W. C. L. J. 119, (1920), McMahon's Case 128 N. E. 778, (1920), 7 W. C. L. J. 70; Peterson & Co. v. Indus. Comm., — Ill. —, 117 N. E. 1033, 1 W. C. L. J. 335.

87. Hanson v. Dickinson,—Ia.—, (1920), 176 N. W. 823, 5 W. C. L. J. 837.

88. Bolden's Case,—Mass.—, (1920), 126 N. E. 668, 5 W. C. L. J. 861.

Where the evidence showed that after the injury had entirely healed, the condition of the injured member necessitated an operation to correct the employee's walking, the court held that a finding that the operation and consequent disability was due to the original injury was justifiable.[89]

Where deceased sustained a fall resulting in a wound on his head, and what followed was shown by deceased's statements and what he said to fellow workmen, which was competent evidence when taken with circumstances surrounding the injury, all showed that the erysipelas and pneumonia was a natural result of the injury, and a finding that the death was due to an accidental cause and not a disease was sufficiently supported by the evidence.[90]

"It is contended that the evidence fails to show that the deceased was engaged in the performance of his duties at the time of the injury. The accident occurred during the working hours, and it is to be inferred from the facts in evidence that the deceased, having completed his tasks at the office of the plaintiff, was about to proceed to other duties of his employment which involved the use of the horse and wagon, and that while unhitching the horse he was killed. The evidence was sufficient to justify the conclusion of the jury that he was engaged in the performance of the duties of his employment at the time he was killed."[91]

Where the evidence showed that a practice of using a different elevator than the one provided for the use of employees was known to the employer, an injury to a boy in the course of his employment while using such elevator entitles him to compensation.[92]

A servant injured while replacing a belt that had slipped off was held to have sustained injuries arising out of the course of

89. Vaselento v. Kasenetz,—App. Div.—, (1920), 180 N. Y. S. 651, 5 W. C. L. J. 728.

90. Wanda v. Jamestown Brwy. Co.,—App. Div.—, (1920), 180 N. Y. S. 694, 5 W. C. L. J. 735; Glennon's Case,—Mass.—, (1920), 128 N. E. 942, 7 W. C. L. J. 210.

91. Western States Gas & Electric Co. v. Bayside Lumber Co.,—Cal.—, (1920), 187 Pac. 735, 5 W. C. L. J. 649; Calaveras Copper Co. et al. v. Indus. Comm.,—Cal.—, (1920), 187 Pac. 129, 5 W. C. L. J. 485.

92. Smith v. H. J. Bartle Mfg. Corp.,—N. Y. App. Div.—, (1919), 178 N. Y. S. 589, 5 W. C. L. J. 306.

employment, where it was shown that this practise was not unusual amongst the employees.[93]

Where the evidence showed that an assault was the result of personal grievances between the workmen, or to excitement over verbal altercation the injury did not arise out of the employment.[94]

Where circumstantial evidence establishes that deceased was about his work in the place where he would naturally be when doing such work, a finding that the injury arose out of the employment will not be disturbed.[95]

Where hearsay evidence has been admitted, an award will not be reversed where competent evidence on the same issue has been received.[96] But hearsay evidence uncorroborated by circumstantial evidence will not sustain an award.[97]

Where the evidence is conflicting on the question of an injured employee's refusal to follow a physician's directions, a finding that there was no such unreasonable refusal will be sustained.[98]

The commission is not bound to decide in accordance with opinion evidence. So, where circumstantial evidence was to the effect that an employee was exceeding the speed limit at the time of the accident, it was held insufficient to annul an award of the

93. Helme v. Great Western Milling Co.,—Cal. App.—, (1919), 185 Pac. 510, 5 W. C. L. J. 143.

94. Edelweiss Gardens v. Indus. Comm., (1919),—Ill —, 125 N. E. 260, 5 W. C. L. J. 176; Ideal Fuel Co. v. Ind. Comm., — Ill. —, 131 N. E. 649.

95. E. E. Walsh Teaming Co. v. Indus. Comm,—Ill.—, (1919), 125 N. E. 331, 5 W. C. L. J. 377; Grant v. Fleming Bros. Co.,—Ia.—, (1920). 176 N. W. 640, 5 W. C. L. J. 688; Vogel v. American Chicle Co.,—N. Y. App. Div. —, (1920), 180 Supp. 645, 5 W. C. L. J. 734; City of Joliet v. Indus. Comm.,—Ill.—, (1920), 126 N. E. 618, 5 W. C. L. J. 802; Sparks Milling Co. v. Indus. Comm. —Ill.—, (1920), 127 N. E. 737, 6 W. C. L. J. 299; Pulcan Detinning Co. v. Indus. Comm., —Ill.—, (1920), 128 N. E. 917, 7 W. C. L. J. 191; Larrabee's Case, — Me. —, 1921, 113 Atl. 268.

96. Streeter's Dependents v. Hunter,—Vt.—, (1919), 108 Atl. 394, 5 W. C. L. J. 472; McCauley v. Imperial Woolen Co., — Pa. —, 104 Atl. 617, 2 W. C. L. J. 930; Valentine v. Weaver, — Ky. App. —, 228 S. W. 1036.

97. McHale v. Sheffield Farms Co., 184 N. Y. S. 576, (1920), 7 W. C. L. J. 115.

98. E. Weiner Co. v. Indus. Comm.,—Wis.—, (1920), 176 N. W. 781, 5 W. C. L. J. 756.

Industrial Board, particularly in view of the presumption against the commission of a crime.[99]

Where the undisputed evidence showed that an employee suffered an injury to his eye, and medical testimony was to the effect that the subsequent infection and loss of sight was caused by the original injury, an award for the loss of the sight due to an injury arising out of the employment was justified.[1]

Where the evidence is equally compatible with a finding that the injury did not arise out of the employment as that it did so arise, the court will not uphold a finding based on mere conjecture.[2] This also applies to alternative findings by a commission.[3]

Evidence that infection followed an injury, which arose out of the employment and developed into blood poisoning, causing death, will support a finding that death was due to an accidental injury which arose out of and in the course of the employment.[4]

Where the evidence shows that an injury arising out of the employment contributed to or caused other complications which would not have arisen except for the original injury, even though

99. U. S. Fid. & Guar. Co. v. Indus. Comm.,—Cal.—, (1919), 183 Pac. 540, 4 W. C. L. J. 591.

1. New Castle Fdry. Co. v. Lysher,—Ind. App.—, 120 N. E. 713, 3 W. C. L. J. 119, 17 N. C. C. A. 251, 791; F. Eggers Veneer Seating Co. et al. v. Indus. Comm.,—Wis.—, (1919), 170 N. W. 280, 3 W. C. L. J. 396; Tracey v. Phil. & Reading Coal & Iron Co., — Pa. —, (1921), 112 Atl. 740; Wasson Coal Co. v. Indus. Comm.,—Ill.—, (1921), 129 N. E. 786; Decatur Con'st. Co. v. Indus. Comm., — Ill. —, (1921), 129 N. E. 738.

2. Chaudier v. Sterns & Culver Lumber Co.,—Mich.—, (1919), 173 N. W. 198, 4 W. C. L. J. 508; McCarthy's Case, — Mass. —, 120 N. E. 852, 3 W. C. L. J. 141, 16 N. C. C. A. 754; John A. Robeling Sons, Co. v. Indus. Comm.,—Cal.—, 171 Pac. 987, 2 W. C. L. J. 38, 16 N. C. C. A. 891; Davis v. Fowler Packing Co., — Kan —, 168 Pac. 1111, 1 W. C. L. J. 385, 15 N. C. C. A. 685; In re Dube,—Mass.—, 116 N. E. 234, A 1 W. C. L. J. 810. But see Paton v. Port Huron Engine and Thresher Co.,—Mich —, (1921), 182 N. W. 639; Miller v. Gardner & Lindberg, — Ia. —, (1921), 180 N. W. 742; Valentine v. Weaver,—Ky. App.—, (1921), 228, S. W. 1036.

3. Kade v. Greenhut Co.,—App. Div.—, 185 N. Y. Supp. 9, 7 W. C. L. J. 232.

4. McRae v. Morgan & Wright,—Mich.—, (1919), 171 N. W. 394, 3 W. C. L. J. 748.

the injured employee was predisposed to such disease or complications, and death or disability results from such complications, the evidence sustains a finding that the consequent disability or death was due to an injury arising out of the employment.[5]

Where medical testimony was to the effect that a prior injury contributed to and caused a later injury, a finding that the later injury was due to the original accident which arose out of the employment, will be sustained.[6]

Where the only witness to the accident testified that the falling box, which was claimed to have caused the injury, struck decedent's toe, a finding that the death, which was admitted to have been caused by a blood clot in the intestine resulting from an injury to the thigh, was due to the injury caused by the fall of the box, cannot be sustained; for to do so would be basing an award on conjecture.[7]

When the claimant testified that in 1909 he had a double hernia; that he could not tell how it occurred; that he suffered no pain; that it came upon him while he was engaged in the lightest kind of work; that he lost no time from his work as the result of it; a finding that the hernia was of recent origin was unjustifiable.[8]

Medical testimony to the effect that erysipelas and septicæmia resulted from a transfer of germs from decedent's injured toe,

5. Ft. Wayne Rolling Mill Corp. v. Buanno,—Ind. App.—, (1919), 122 N. E. 362, 3 W. C. L. J. 626; Wabash Ry. Co. v. Indus. Comm.,—Ill.—, 121 N. E. 569, 3 W. C. L. J. 435, 18 N. C. C. A. 1087; Hanna v. Mich. Steel Casting Co.,—Mich.—, 170 N. W. 6, 3 W. C. L. J. 322, 18 N. C. C. A. 314; Schanning v. Standard Castings Co.,—Mich.—, 169 N. W. 879; 3 W. C. L. J. 331, 18 N. C. C. A. 293; Indian Creek Coal & Mining Co. v. Calvert,—Ind. App.—, 119 N. E. 519, 2 W. C. L. J. 230, 17 N. C. C. A. 865.

6. Adams v. W. E. Wood Co.,—Mich.—, 169 N. W. 845, 3 W. C. L. J. 311, 18 N. C. C. A. 236, 749.

7. Ginsberg v. Burroughs Adding Mach. Co.,—Mich.—, 170 N. W. 15. 3 W. C. L. J. 317; 18 N. C. C. A. 314.

8. McPhee & McGinnity Co. v. Indus. Comm., of Colo.,—Colo.—, (1919), 185 Pac. 268, 5 W. C. L. J. 160.

while he was treating it as an ordinarily prudent person would, is sufficient to warrant a finding that the death was due to the original injury, and not to the injured employee's negligence.[9]

Where it was claimed that a cancer on employee's penis resulted from an injury to his hand two and one-half years previous to the development of the cancer, the court held that in view of the medical testimony, which was to the effect that, because of deceased's emaciated condition resulting from the injury to his hand, the germ, which might have come from the injured hand, found little resistance, a finding that the cancer was proximately caused by the injury to the hand would have to rest on mere conjecture, and was therefore not sustainable.[10]

Where the evidence showed that at the time of the injury a hospital employee was engaged in washing her own linen, her injury could not be said to have arisen out of the employment.[11] The same was held true of a night watchman away from his place of employment on business of his own.[12]

The court, in holding that there was sufficient evidence to support a finding that the injury arose out of the employment, said: "It is also contended that plaintiff was not engaged in the discharge of any duty, imposed by his employment, when injured. However, the record shows (according to the testimony of one of the defendants) that 'his place of duty was to attend to the lumber behind the edger and operate the cut-off saw when needed.' It was by this cut-off saw that he was injured. The saw was supported on a shaft which was moved up or forward to bring it in contact with the lumber on the rollers, by means of a pedal worked with the feet, and when released it was swung

9. Bethlehem Shipbuilding Corp. v. Indus. Acc. Comm., — Cal. —, (1919), 185 Pac. 179, 5 W. C. L. J. 128.

10. Ortner v. Zenith Carburetor Co.,—Mich.—, (1919), 5 W. C. L. J. 273, 175 N. W. 122.

11. Gernhardt v. Indus. Comm.,—Cal. App.—, (1919), 185 Pac. 307, 5 W. C. L. J. 151.

12. Borck v. Simon J. Murphy Co., — Mich. —, (1919), 171 N. W. 470, 3 W. C. L. J. 746, 18 N. C. C. A. 1043; Meyer v. Packard Motor Car Co., — Mich. —, (1919), 171 N. W. 403, 3 W. C. L. J. 756, 18 N. C. C. A. 1029.

back in place by a heavy weight attached by a cable running through a pulley to the shaft. At the time of the injury, the cable had gotten out of the pulley as it seems to have done on prior occasions, and the plaintiff had gotten over the roller bed and down under the saw, for the purpose of replacing it, when, in some manner not altogether clear, his hand came in contact with the revolving saw, with the result that he lost all of the fingers on the left hand as above stated. The evidence is not clear as to just whose duty it was to have replaced the cable under these circumstances, but it seems to have been done by those who operated the saw. In any event, contributory negligence has been eliminated by the statute as a defense, under which this action is brought, and we think the injury was inflicted while in the employment of the defendants, and under such circumstances as to clearly render them liable therefor."[13]

"The applicant testified to the effect that the injured eye was 'all right' before the accident, that he could see all right, and could read with it before the accident. Two doctors testified that the vision of the applicant's left eye for practical use was wholly destroyed by the accident, but that in their opinion in view of all the facts shown regarding the condition of applicant's eye, he had, prior to the accident, about 27 per cent normal vision in his left eye. The commission in its determination of the issue of facts presented by the evidence declared:

"With all due respect for the opinion of experts there was no direct evidence that the applicant's eye was not normal before the accident. Against this (doctor's) opinion, we have the applicant's own testimony to the effect that prior to the accidental injury his left eye was all right. At any rate, the applicant had useful vision in said eye before it was injured. For all practical purposes to him the left eye was performing the functions of a normal eye.

"This evidence sustains these conclusions of the commission. The circuit court properly held that this determination of fact by the commission in the light of the evidence is conclusive upon the

13. Smith v. White, 146 La. —, (1920), 83 So. 584 5 W. C. L. J. 531.

courts under section 2394-19, Stats. International Harvester Co. v. Industrial Com'n, 157 Wis. 147, 167 N. W. 53, Ann. Cas. 1916B, 330; Borgims v. Falk Co., 147 Wis. 359-361, 133 N. W. 209, 37 L. R. A. (N. S.) 489.'' [14]

The court in holding that the evidence did not justify the contention that decedent's failure to consult a physician was the cause of his death, said: ''That it is not at all plain from the record that, if he had consulted a physician, his life would have been saved. Upon the hearing before the Industrial Commission Dr. Wetzler, the company's physician, was asked this question:

'' 'If an infection of that kind has started in a day or two after an accident of that kind, and the man had obtained medical treatment, it would not be difficult to clean up an infection, would it? A. Well, I won't say. Sometimes even with early treatment a severe type of streptococcic infection will prove fatal in spite of treatment, but those infections then develop almost immediately after the onset of the injury.'

''In view of this evidence it may be said, as the learned circuit judge said in deciding the case, that—

''No one can say with the certainty that is essential in order to set aside a finding of the Industrial Commission that the injured workman increased his disability or met his death because of his failure to secure medical treatment at an earlier date.'' [15]

Evidence that a workman doing ordinary work felt pain in his side and the next day a physician found a right inguinal hernia of traumatic origin, is insufficient to show an accidental injury in the course of the employment.[16]

Where the evidence showed that a pattern maker, in leaving the plant long after working hours, discovered a fire and returned

14. Pawling & Harnischfeger Co. v. Midenberger, —, Wis.—, (1919), 174 N. W. 455, 5 W. C. L. J. 121; Indiana Power and Water Co. v. Miller, — Ind. App. —, (1920), 127 N. E. 837, 6 W. C. L. J. 16; Jackson v. Iowa Tel. Co.,—Ia.—, (1920), 179 N. W. 849, 7 W. C. L. J. 54.

15. Banner Coffee Co. v. Indus. Comm., Wis. , (1919), 174 N. W. 544, 5 W. C. L. J. 118.

16. Cavalier v. Chevrolet Motor Co. of New York, — App. Div.—, (1919), 178 N. Y. S. 489, 5 W. C. L. J. 93; Alpert v. Powers,— N. Y. App. Div.—, 119 N. E. 229, 2 W. C. L. J. 106.

to put it out, and in so doing lost his life, the finding of the commission that the death was due to an accident arising out of the employment was supported by the evidence.[17]

There was evidence to justify a finding that deceased, who cut his hand on a piece of glass and died of septic poisoning, was injured as the result of an accident arising out of and in the course of the employment. It having been shown that at the time of the injury deceased was engaged in his regular duties as a bottler, although it was not definitely shown just how he received the cut, the court said: "The burden rests upon the claimant to show by competent testimony, not only the fact of the injury, but that it occurred in connection with the employment of the deceased; to furnish evidence from which the inference can be logically drawn that the injury arose out of and in the course of his employment; that the proof must be based on something more than mere guess or conjecture; that the proof of such facts may be established by circumstantial as well as by direct evidence, and the greater or less probability, leading, on the whole, to a satisfactory conclusion, is all that can reasonably be required to establish controverted facts. Ohio Building Safety Vault Co. v. Industrial Board, 277 Ill. 96, 115 N. E. 149; Mechanics' Furniture Co. v. Industrial Board, 281 Ill. 530, 117 N. E. 986; Smith-Lohr Coal Co. v. Industrial Com., 286 Ill. 34, 121 N E. 231. It is not necessary, under these authorities, that there should be eyewitnesses to the accident. We think there is evidence in the record that justified the Industrial Board in finding that the accident arose out of and in the course of the employment of the deceased: This being so, the courts are bound by the finding of said board on this question." [18]

17. Belle City Malleable Iron Co. v. Indus. Comm., — Wis. —, (1919), 174 N. W. 899, 5 W. C. L. J. 333; Associated Employers Reciprocal v. Indus. Comm., — Okla. —, 200 Pac. 174.

18. Hydrox Chemical Co. v. Indus. Comm., — Ill. —, (1920), 126 N. E. 564, 5 W. C. L. J. 811; Edelweiss Gardens v. Indus. Comm., — Ill. —, (1919), 125 N. E. 260, 5 W. C. L. J. 176; Swing v. Kokomo Steel & Wire Co., — Ind. App. —, (1919), 125 N. E. 471, 5 W. C. L. J. 380; Geo. S. Mephan & Co. v. Indus. Comm., — Ill. —, (1919), 124 N. E. 540, 5 W. C. L. J. 36; Laskowski v. Jessup & Moore Paper Co., — Del. —, (1919), 108

Where the evidence shows that the employee was never affected with a germ-carrying disease, and the medical testimony was to the effect that the loss of the eyesight was caused by the injury, a finding that atrophy of the eyes was due to an accident arising out of the employment, will be sustained.[19]

"Where the evidence showed, among other things, that a workman fell and was hurt while working at a long inclined table, and while standing on a wet, inclined platform, it was held that, as against a demurrer thereto, the evidence was sufficient to show that the fall was accidental, that it was caused by the condition of the table and platform, and that the accident arose out of the employment."[20]

Where the evidence shows that the employee was engaged in duties which were not within the scope of the employer's regular business, nor incidental to it, it cannot be said that his injuries arose out of the employment.[21]

Where, in a proceeding for additional compensation because of a recurrence of the injury the evidence was sufficient to justify a finding of total disability the employer cannot complain of a finding of partial disability.[22]

Where there was evidence that a workman complained of injuring his thumb, and his work was of the kind where abrasions were a common form of injury, there also appeared to be fresh blood on the nail, and after consulting the employer's physician

Atl. 281, 5 W. C. L. J. 167; Mailman v. Record Foundry Mach. Co., — Me. —, (1919), 106 Atl. 606, 4 W. C. L. J. 204; Zoladtz v. Detroit Auto Specialty Co., — Mich. —, (1919), 172 N. W. 549, 4 W. C. L. J. 259; Smith-Lohr Coal Mining Co. v. Indus. Comm., — Ill. —, 121 N. E. 231, 3 W. C. L. J. 250, 18 N. C. C. A. 222, 238; Southwestern Surety Ins. Co. v. Owens, — Tex. Civ. App. —, 198 S. W. 662, 1 W. C. L. J. 271, 15 N. C. C. A. 524.

19. Nelson v. Indus. Ins. Dept., — Wash. —, 176 Pac. 15, 3 W. C. L. J. 199, 17 N. C. C. A. 1057.

20. Madey v. Swift & Co., — Kan. —, 168 Pac. 1105, 1 W. C. L. J. 382, 15 N. C. C. A. 227.

21. Walsh v. F. W. Woolworth Co., — App. Div. —, 167 N. Y. S. 394, 1 W. C. L. J. 261.

22. Carson-Payson Co. v. Indus. Comm., — Ill. —, 121 N. E. 264, 3 W. C. L. J. 234, 18 N. C. C. A. 238.

as directed, he returned home and the following day was found to be suffering from septicaemia, which resulted in his death, the court held that there was sufficient evidence that the death was due to an injury arising out of the employment.[23]

Evidence that a salesman whose territory was outlined for him, went beyond this territory and into territory which he was not supposed to make, was sufficient to justify a finding that he had departed from the scope of his employment, at the time of his injury, for his own personal interests.[24]

Where the board has listened to all the evidence in the case they are not bound to accept the conclusions of the medical witnesses on the facts involved.[25]

Evidence of a pre-existing hernia, an operation and unsatisfactory recovery because of typhoid fever, a subsequent strain while lifting 150 lbs. to a height of four feet while at work, and medical testimony to the effect that the present hernia was caused by the strain is sufficient evidence to justify a finding that the injury arose out of the employment.[26]

Evidence that deceased's fall and subsequent death were caused by a blood clot and pressure on the brain, will not in the absence of evidence that this condition was brought on by an injury arising out of the employment, support an award.[27]

"The relator claims that the accident did not occur in the course of Chambers' employment. He was engaged as a solici-

23. Kinney v. Cadillac Motor Car Co., — Mich. —, 165 N. W. 651, 1 W. C. L. J. 395, 15 N. C. C. A. 586; Zukowsky v. Phil. & Reading Coal and Iron Co., — Pa. —, (1921), 113 Atl. 62; Yodis v. Phil. & Reading Coal and Iron Co., — Pa. —, (1921), 113 Atl. 73.

24. State ex rel. Niessen v. District Court, — Minn. —, (1919), 172 N. W. 133, 4 W. C. L. J. 109; Piske v. Brooklyn Cooperage Co., — La. —, 78 So. 734, 2 W. C. L. J. 264; 16 N. C. C. A. 929.

25. Dow's Case, — Mass. —, 121 N. E. 19, 3 W. C. L. J. 144, 17 N. C. C. A. 940.

26. Puritan Bed Spring Co. v. Wolfe, — Ind. App. —, 120 N. E. 417, 3 W. C. L. J. 39, 17 N. C. C. A. 872.

27. Hansen v. Turner Const. Co., — N. Y. App. Div. —, 120 N. E. 693, 3 W. C. L. J. 168, 17 N. C. C. A. 786; McHale v. Sheffield's Farm Co., 184 N. Y. S. 576, 7 W. C. L. J. 115, (1920).

tor in the grain business and had his home at Bismarck, which was the point from which he worked. He had been using the auto in the course of his business during the day and was returning homeward. The evidence sustains, if indeed it does not require, a finding that he was in the course of his employment. It is much stronger than the evidence in State v. District Court, 166 N. W. 274, which is in some respects similar."[28]

The court, in holding that an employer's report of an accident was competent and sufficient evidence to sustain a finding that the injury arose out of the employment, said: "We think that such reports from the employer, where all sources of information are at hand when the reports are made, and he has ample opportunity to satisfy himself of the facts, can properly be taken as an admission, and, at least, prima facie evidence that such accident and injury occurred as reported."[29]

"The relator company operates a woodworking factory. Filas was employed by it. The court finds that some of the employees of the relator, referred to in the evidence as boys or kids, were accustomed during working hours to throw missiles such as blocks of wood and sash pins at one another and at others including Filas; that the relator knew of the custom or should have known of it in the exercise of diligence; that on May 31, 1917, a fellow employee of Filas threw a sash pin at him in sport and without intending to injure him; that it hit him in the eye and destroyed his vision; that Filas was at the time engaged in his work; and that he did not then and had not at any time engaged with his fellow employee in sport of this kind. These findings are sustained. Filas claims that he at no time engaged with his fellow employees in throwing missiles and that he complained to the company of the acts of the particular employee. No specific findings are made upon these points. The court finds

28. State ex rel. London & Lancashire Indemnity Co. of America v. District Court,—Minn.—, (1919), 170 N. W. 218, 3 W. C. L. J. 337, 16 N. C. C. A. 77, 79.

29. Hege & Co. v. Tompkins,—Ind. App.—, (1919), 121 N. E. 677, 3 W. C. L. J. 451.

that the accident arose out of Filas' employment. Whether it did, is the only question.

"The rule is well enough settled that where workmen step aside from their employment and engage in horseplay or practical joking, or so engage while continuing their work, and accidental injury results, and in general where one in sport or mischief does some act resulting in injury to a fellow worker, the injury is not one arising out of the employment within the meaning of compensation acts. Note, 12 N. C. C. A. 789, note-L. R. A. 1916A, 23, 47-93; Hulley v. Moosbrugger, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C, 1203; Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164; Fishering v. Pillsbury, 172 Cal. 690, 158 Pac. 215; Federal, etc., Co. v. Havolic, 162 Wis. 341, 156 N. W. 143, L. R. A. 1916D, 968; Pierce v. Boyer-Van Kuran, etc., Co., 99 Neb. 321, 136 N. W. 509, L. R. A. 1916D, 970; De Filippis v. Falkenberg, 170 App. Div. 153, 155 N. Y. Supp. 761; Armitage v. L. & Y. Ry. Co., (1902), 2 K. B. 178; Fitzgerald v. Clark, (1908), 2 K. B. 796. Here we conceive the situation to be different. Filas was exposed by his employment to the risk of injury from the throwing of sash pins in sport and mischief. He did not himself engage in the sport. His employer did not stop it. The risk continued. The accident was the natural result of the missle-throwing proclivities of some of Filas' fellow workers and was a risk of the work as it was conducted. In McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, injuries resulting from blows administered in frenzy by an intoxicated fellow worker known by the employer to be in the habit of becoming intoxicated, and in that condition to be dangerous, were held to arise out of the employment. Liability was rested 'upon the causal connection between the injury of the deceased and the conditions under which the defendant required him to work.' In Clayton v. Hardwick Colliery Co., 9 B. W. C. C. 136, reversing 7 B. W. C. C. 643, a finding that a boy who was working with other boys in a colliery picking stones from coal and was injured by a stone thrown by another boy was so subjected by his employment to a special risk that the injury arose out of his employment was

sustained. In Challis v. London, etc., Co., (1905) 2 K. B. 154, the injuries to an engineer who was driving his engine under a bridge and was hit by a stone thrown by a boy from the bridge were held to arise out of his employment. And see Pekin Cooperage Co. v. Industrial Board, 277 Ill. 53, 115 N. E. 128; In re Loper, (Ind. App.), 116 N. E. 324; Knopp v. American, etc., Co., 186 Ill. App. 605; State v. District Court, 134 Minn. 16, 158 N. W. 713, L. R. A. 1916F, 956.

"The ultimate finding that the injury to Filas arose out of his employment is sustained by the evidence." [30]

While the master's report to the Industrial Commission of an injury to his servant, and an admission in the answer before the commission that the servant was injured, is evidence of the accident, it is not, in the absence of additional proof, evidence that the diseases and death occurring subsequent to the injury were caused by the injury.[31]

Where the evidence did not disclose facts from which an inference could be drawn that deceased's employment exposed him to increased hazard from the sun's rays, a finding was proper that sunstroke suffered by the workman was not due to the employment.[32]

Where a workman about furnaces was drowned in a nearby river, and it was shown that while gas often emanated from the furnaces, causing the workmen to become dizzy and faint, and that they would have to go out on the river bank to get fresh air, but that on the night in question no such gases were noticed, nor did deceased have any work to perform about the furnaces, a finding that the drowning was due to conditions of the employment would of necessity have to be based upon conjecture and surmise which will not support an award.[33]

30. State ex rel. Johnson Sash & Door Co. v. District Court,—Minn. —, 167 N. W. 283, 2 W. C. L. J. 95, 16 N. C. C. A. 921.

31. A. Breslauer Co. v. Indus. Comm.,—Wis.—, 167 N. W. 256, 2 W. C. L. J. 189, 18 N. C. C. A. 235.

32. Campbell v. Clausen-Flanagan Brewery,—N. Y. App. Div.—, 171 Supp. 522, 2 W. C. L. J. 676, 17 N. C. C. A. 1001.

33. Wisconsin Steel Co. v. Indus. Comm.,—Ill.—, (1919), 123 N. E. 295, 4 W. C. L. J. 168; In re Whalen, (1919), 173 N. Y. S. 856, 3 W. C. L. J. 510, 18 N. C. C. A. 1037.

Where the evidence shows that a second injury causing death was directly due to the first injury, which so weakened the leg bone that it broke in an attempt of the employee to get out of bed, the court held that the board was justified in finding that death was due to an injury which arose out of the employment.[34]

To prove that the death was accidental, it is not necessary to negative every other possibility, nor need the proof be direct and positive. So, where it was shown that a boat cook fell from a wharf and was drowned while engaged in securing provisions, it was held that the evidence was sufficient to sustain a finding that the death was due to an accident arising out of the employment.[35]

Where it was shown that an injury to an employee's foot, so deranged his whole system as to cause an obstruction of the bowels causing death, it was held that death was due to the accidental injury. The admission of hearsay testimony was immaterial where the finding was based on other testimony.[36]

"Section 21 of the New York Workmen's Compensation Law (Consol. Laws, c. 67) provides that, in the absence of substantial evidence to the contrary, it shall be presumed that 'the injury did not result solely from the intoxication of the injured employee while on duty,' but in this case there was such substantial evidence. Indeed, the evidence was preponderating that the decedent was staggering drunk at the very time of the accident, and all of the known facts point to this as the proximate cause of the death." [37]

Where evidence shows that an injury to the side so weakened deceased's power of resistance as to subject him to disease, and

34. G. H. Hammond Co. v. Indus. Comm.,—Ill.—, (1919), 123 N. E. 384, 4 W. C. L. J. 176.

35. Westman's Case,—Me.—, (1919), 106 Atl. 532, 4 W. C. L. J. 213; Mailman v. Record Foundry & Mach. Co.,—Me.—, (1919), 106 Atl. 606, 4 W. C. L. J. 205; Riley v. Mason Motor Car. Co.,—Mich —, 165 N. W. 745, 1 W. C. L. J. 406, 18 N. C. C. A. 307.

36. Doherty v. Grosse Isle Twp., — Mich. —, (1919), 172 N. W. 596, 4 W. C. L. J. 222.

37. Trouton v. M. J. Sheehy Ice Co., 187 App. Div. 818, 176 N. Y. Supp. 45, 4 W. C. L. J. 292.

that disease did result, causing death, it was held that the death was due to the injury arising out of the employment.[38]

Where the evidence shows that the injured employee was in the performance of his regular duties at the time of the accident, or circumstances are shown which tend to indicate that he was at the place where he was supposed to be and under conditions which would show that he was in all probability engaged in his regular work, a finding that the injury or death was due to an accident arising out of the employment will be sustained, even in the absence of eyewitnesses.[39]

38. Folts v. Robertson,—App. Div.—, (1919), 177 N. Y. S. 34, 4 W. C. L. J. 429; Murdock v. New York News Bureau,—Pa.—, (1919), 106 Atl. 788, 4 W. C. L. J. 451; Murray City v. Indus. Comm. of Utah, — Utah —, (1919), 183 Pac. 331, 4 W. C. L. J. 647; Bergstrom v. Indus. Comm.,—Ill. —, 121 N. E. 195, 3 W. C. L. J. 232, 18 N. C. C. A. 295; State Indus. Comm. v. Geo. W. Stiles Const. Co., 184 N. Y. S. 598, 7 W. C. L. J. 134.

39. Heinze v. Indus. Comm.,—Ill.—, (1919), 123 N. E. 598, 4 W. C. L. J. 361; Gabriel v. A. J. Smith Con'st. Co.,—Mich.—, (1919), 173 N. W. 195, 4 W. C. L. J. 504; Bachman v. Waterman,—Ind. App.—, 121 N. E. 8, 3 W. C. L. J. 115, 17 N. C. C. A. 956; Bekkedal Lumber Co. v. Indus. Comm.,—Wis.—, 169 N. W. 561, 18 N. C. C. A. 298, 3 W. C. L. J. 212; Great Lakes Dredge & Dock Co. v. Totzke,—Ind. App.—, (1919), 121 N. E. 675, 3 W. C. L. J. 448, 18 N. C. C. A. 1032; Hallets Case, — Mass. —, (1919), 121 N. E. 503, 3 W. C. L. J. 481, 16 N. C. C. A. 755; Manziano v. Pub. Serv. Gas Co., — N. J. —, 105 Atl. 484, 3 W. C. L. J. 488, 18 N. C. C. A. 1026; Hanna v. Michigan Steel Castings Co., — Mich. —, 170 N. W. 6, 3 W. C. L. J. 322, 18 N. C. C. A. 314; Wolford v. Geisel Moving & Storage Co., — Pa. —, (1919), 105 Atl. 831, 3 W. C. L. J. 798; Piske v. Brooklyn Cooperage Co., — La. —, 78 So. 734, 2 W. C. L. J. 264; Peoria Cordage Co. v. Indus. Bd., — Ill. —, 119 N. E. 996, 2 W. C. L. J. 451, 17 N. C. C. A. 245, 291; McMinn v. Kern Brwg. Co., — Mich. —, 168 N. W. 542, 2 W. C. L. J. 645, 18 N. C. C. A. 302; Robinson v. State, — Conn. —, 104 Atl. 491, 2 W. C. L. J. 779, 17 N. C. C. A. 251, 954; Haskell & Barker Car Co. v. Brown, — Ind. App. —, 117 N. E. 555, 1 W. C. L. J. 48, 15 N. C. C. A. 640; In re Uzzio, — Mass. —, 117 N. E. 349, 1 W. C. L. J. 80, 15 N. C. C. A. 234; Dickinson v. Indus. Bd., — Ill. —, 117 N. E. 438, 1 W. C. L. J. 28, 16 N. C. C. A. 888; Bucyrus Co. v. Townsend, — Ind. App. —, 117 N. E. 565, 1 W. C. L. J. 166, 16 N. C. C. A. 646; Meyers v. Mich. Cent. R. Co., — Mich. —, 165 N. W. 703, 1 W. C. L. J. 402, 15 N. C. C. A. 277; Wishcaless v. Hammond Standish & Co., — Mich. —, 166 N. W. 993, 1 W. C. L. J. 1055, 18 N. C. C. A. 293; Ohio Buildings Co. v. Indus. Bd., 277 Ill. 96, 115 N. E. 149, 14 N. C. C. A.

Where it was shown that deceased, a stableman, might have finished all his work shortly after 7 p. m. and that about 8 p. m. he was found in a gutter about 50 ft. from the employer's premises with broken ribs and no circumstances to show that he might have been engaged in any of his duties to his master, an award cannot stand, despite the presumption established by Section 21 of the New York Act to the effect that in the absence of substantial evidence to the contrary it shall be presumed that the claim comes within the provisions of the act.[40]

Where the industrial commission made an alternative finding that claimant's injuries resulted, either from a fall about an hour after he had been assaulted by a stranger, to whom he had applied an approbrious epithet, when the stranger bungled some work in which he volunteered to assist, or from the assault, the court held that this finding was insufficient to justify an award, notwithstanding the presumption created by Section 21, of the New York Act, there being nothing to show that the fall was incidental to the employment, and, as the findings were in the alternative each case must be sufficient to justify the award.[41]

The court, in holding that the evidence justified a finding that the injury arose out of the employment, said: "There is thus a substantial conflict between the testimony of the physician and the testimony of the three other witnesses, although there is no doubt that the greater quantity of the evidence, looking at quantity alone, was to the effect that there was an elevation on the clavicle soon after the accident and on the same day. But the Commission was not bound to take the greater quantity of the evidence as

224; Papinaw v. Grand Trunk Ry. Co. of Canada., — Mich. —, 155 N. W. 545, 12 N. C. C. A. 243; Meyers v. Portland Ry., Light & Power Co., 68 Ore. 599, 138 Pac. 213, 9 N. C. C. A. 119; Kropf v. Mich. Bean Co., — Mich. —, (1920), 179 N. W. 276, 6 W. C. L. J. 686; Perry v. Woodward Bowling Alley Co. — Mich. —, 163 N. W. 52; Sesser Coal Co. v. Indus. Comm., — Ill. —, (1921), 129 N. E. 536.

40. Russo v. Jarvis Slores, — App. Div. —, (1920), 185 N. Y. S. 281, 7 W. C. L. J. 227.

41. Lorchitsky v. Gotham Folding Box Co., — N. Y. App. Div. —, (1920), 128 N. E. 899, 7 W. C. L. J. 218; Greenberg v. Greenberg, — N. Y. App. Div. —, (1920), 185 N. Y. S. 258, 7 W. C. L. J. 230.

against the lesser. Its members may have seen ample reason to accept the testimony of the physician as against that of the other witnesses. In this state juries are to be instructed that:

"They are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number, * * * satisfying their minds." Code Civ. Proc. Sec. 2061, subd., 2.

"The principle behind this rule operates as strongly upon the Industrial Accident Commission as instructions under it do upon juries."[42]

An employee returning from a trip for his own purposes had reached a point where he intended to take a stage, when he met his employer's superintendent, who offered to allow him to ride home on a truck if he assisted in loading it, and that he would be paid by his employer for loading the truck. While on the trip to the mine he was injured, and the court held that while riding back to the mine, the employee was not acting in the interests of his employer and therefore the injury did not arise out of the employment.[43]

Where the medical testimony is conflicting regarding the cause of rheumatism resulting in disability, a finding by the commission that the rheumatism was not due to the accidental injury sustained by the employee will be upheld.[44]

An employee's opinion as to the cause of the injury resulting in deafness unsupported by medical testimony showing a causal connection between the employment and the injury, will not support an award.[45]

Where the evidence shows that the accident occurred after work hours, while the employee was on his way home, away from

42. Santa Ana Sugar Company of Santa Ana v. Indus. Comm., — Cal. —, 170 Pac. 630, 1 W. C. L. J. 745, 17 N. C. C. A. 876.

43. Boggess v. Ind. Comm., — Cal. —, 169 Pac. 75, 1 W. C. L. J. 293, 15 N. C. C. A. 268.

44. Jackson v. Iowa Telephone Co., — Iowa —, (1920), 7 W. C. L. J. 54, 179 N. W. 849.

45. Ferst v. Dictograph Products Corporation, 184 N. Y. S. 422, (1920), 7 W. C. L. J. 100.

the employer's premises the Board was justified in finding that the injury did not arise out of the employment.[46]

Where a rule of the company forbade employees to run an elevator but premitted such employees, as had been with the company long enough to be characterized as old employees, to operate the elevator, and the commission found that the injured employee had been with the company for a considerable length of time and was not guilty of violating rules of a nature to place him outside of his employment, there was sufficient evidence to warrant such finding.[47]

Where the evidence shows that deceased was in poor physical condition as the result of an attack of influenza, and that his duties brought him near to an uninsulated wire carrying a dea[illegible] volt and the evidence whether death was caused by an electric shock or not, was conflicting, the board was justified in finding that death was due to electrocution and not to disease.[48]

§ 524. **Dependency.**—Where the evidence showed that deceased, a farmer boy who was his parents' chief help, sought temporary employment elsewhere to enable him to buy clothing for himself, with the intention of returning to the farm to assist his parents, who were poor and failing in health and strength, the board was justified in finding that the parents were dependent upon him.[49]

"Where persons of limited means, such as respondents, and otherwise entitled to compensation, had actually received contributions for support from the wages of the deceased employee, such facts would constitute evidence strongly tending to establish dependency. In re Derinza, 229 Mass. 435, 118 N. E. 942, 16 N. C. C. A. 210; In re McMahon, 229 Mass. 48, 118 N. E. 189. In the last-cited case the situation was strikingly similar to that

46. Stahl v. Watson Coal Co., — Pa. —, (1920), 112 Atl. 14.

47. Rockford Cabinet Co. v. Indus. Comm., — Ill. —, (1920), 129 N. E. 142, 7 W. C. L. J. 280.

48. Wasson Coal Co. v. Indus. Comm., — Ill. —, (1921), 129 N. E. 786.

49. Southern Surety Co. v. Hibbs, — Tex. Civ. App. —, (1920), 221 S. W. 303, 6 W. C. L. J. 224.

in the case at bar in relation to the question of dependency of parents. The sufficiency of the evidence before the industrial commissioner, on the question of dependency, is not subject to review, by an appellate court, where there is any reasonable or substantial evidence tending to establish the findings of the commissioner, Paul c. Com., 288 Ill. 532, 123 N. E. 541, 18 N. C. C. A. 292, and note; Crosaro v. Com., (Cal. App.), 177 Pac. 489; Bloomington-B Stone Co. v. Phillips, (Ind. App.), 116 N. E. 850."[50]

"The father is in the prime of life, 42 years of age, in good health, and able to follow his occupation all the time; the mother is also well and strong, and the sister making her own living away from home, receiving $120 per month, and contributing nothing to the support of her parents. Presumably they were in no wise dependent on her wages." And the mere fact that decedent gave his mother practically all his wages would not be sufficient to establish dependency.[51]

Mere statements of a deceased employee, to the witness that he sent money to his alien parents, and statements of deceased's mother that she received $100 from her son, without the witness having seen the receipts of such remittances or having any actual knowledge of the parent's condition, is insufficient to establish dependency.[52]

Testimony to the effect that there was an actual estrangement and separation for more than a year, was sufficient to support a

50. Day v. Sioux Falls Fruit Co., —So. Dak.—, 177 N. W. 816, 6 W. C. L. J. 216; Geo. A. Lowe, v. Ind. Comm. of Utah, —Utah—, (1920), 190 Pac. 934, 6 W. C. L. J. 511; Globe v. Grain & Milling Co., —Utah—, (1920), 193 Pac. 642, 7 W. C. L. J. 245; Ogden City v. Indus. Comm., —Utah—, (1920), 193 Pac. 857, 7 W. C. L. J. 249.

51. Rudnick v. White Bros., —Del.—, (1920), 109 Atl. 881, 6 W. C. L. J. 138; Frey v. McLoughlin Bros. Inc., —App. Div.—, (1919), 175 N. Y. S. 873, 4 W. C. L. J. 133; Foskit v. A. J. Buschman & Co., 183 N. Y. S. 919, (1920), 6 W. C. L. J. 562.

52. Keystone Steel & Wire Co. v. Indus. Comm., — Ill. —, (1919), 124 N. E. 542, 5 W. C. L. J. 40; Bonnano v. Metz Bros. Co., — App. Div. —, (1919), 177 N. Y. S. 51, 4 W. C. L. J. 427.

finding that deceased's widow was not living with him at the time of the accident, within the meaning of the act.[53]

Evidence that deceased sent two sums of money to his father three and a half years prior to the date of the accident, is insufficient to establish dependency.[54]

A finding of a probate court that a certain woman was deceased's widow is not even prima facie evidence of such fact as against the employer. Evidence that the woman claiming to be decedent's widow sustained only adulterous relations with him, without any semblance of a marriage, is insufficient to establish dependency.[55]

Evidence that deceased had abandoned his wife for over a year and did not contribute to her support, would not justify a finding that she was living with him at the time of the accident, within the meaning of the Michigan Act.[56]

Evidence that the decedent's widow, who was living temporarily with her son and apart from her husband at the time of his death, was doing so because of ill health and unsound mental faculties, justified a finding that she was living with her husband at the time of his death, within the meaning of the Wisconsin Act (St. 1917, Sec. 2394-10, subd. 3), and therefore conclusively presumed to be dependent.[57]

Evidence that the deceased husband and his wife were by agreement living apart, at the time of his accidental death, to enable them better to earn a living, or for other like reasons, will justify a finding that they were living together, within the meaning of the act.[58]

53. Smith v. Industrial Comm., — Wis. —, (1919), 174 N. W. 462, 5 W. C. L. J. 123.

54. Peabody Coal Co. v. Indus. Comm., —Ill.—, (1919), 124 N. E. 603, 5 W. C. L. J. 57.

55. Ill. Steel Co. v. Indus. Comm., —Ill.—, (1919), 125 N. E. 252, 5 W. C. L. J. 119.

56. Burdick v. Grand Trunk Ry. System, —Mich.—, (1919), 175 N. W. 132, 5 W. C. L. J. 266.

57. Belle City Malleable Iron Co. v. Indus. Comm., —Wis.—, (1919), 174 N. W. 899, 5 W. C. L. J. 333.

58. James Black Dry Goods Co. v. Iowa Indus. Comm.,—Iowa,—,(1919),

Where it was not shown that the son's contributions to his mother exceeded the amount expended for his board, room, clothes and incidentals, there was no evidence to support a claim of dependency.[59]

Where the evidence shows that at the time of deceased's death he was living with his wife, it is immaterial that prior to this time they were living apart, and the conclusive presumption of dependency will obtain.[60]

Statements of an "officer in charge" as to birth of decedent and a claim of dependency by the parents, is not competent evidence of the existence of the parents, since a certified copy of the record, being the best evidence, is essential.[61]

Where it appeared from the evidence that the sons contributions constituted a part of the support of the mother and other members of the family but there was no evidence for determining what proportion of it was used for the support of the mother she is entitled under the finding of partial dependency to the minimum award of $1650.[62]

"The mere fact that a father receives money from a son and expends it, is not alone sufficient to establish dependency."[63]

In the absence of evidence that a son had contributed to the support of his parents within a year prior to his death, an award of dependency will not be sustained under the New York Act.[64]

173 N. W. 23, 4 W. C. L. J. 379; Hinchuk v. Swift & Co., —Minn.—, (1921), 182 N. W. 622.

59. McGarvie v. Frontenac Coal Co., —Kan.—, 175 Pac. 375, 3 W. C. L. J. 46.

60. Doherty v. Grosse Isle Twp., —Mich—, (1919), 172 N. W. 596, 4 W. C. L. J. 222.

61. Bonnano v. Metz Bros., —App. Div.—, (1919), 177 N. Y. S. 51, 4 W. C. L. J. 427.

62. Rock Island Bridge and Iron Works v. Indus. Comm., —Ill.—, (1919), 122 N. E. 830, 4 W. C. L. J. 33; Wilkes v. Rome Wire Co., 172 N. Y. S. 406, 3 W. C. L. J. 174.

63. Birmingham v. Westinghouse Electric & Mfg. Co., 180 App. Div. 48, 167 N. Y. Supp. 520.

64. Profeta v. Retsof Mining Co., —App. Div.—, (1919), 177 N. Y. S. 60, 4 W. C. L. J. 444; Drummond v. Isbell Porter Co., — App. Div. —,

A mother is partially dependent upon her deceased son even though her husband is living and aiding in her support, where the evidence shows that the deceased turned over his wages to his mother, and that she actually looked to his wages as a means of helping to provide her support.[65]

Where there was some testimony to the effect that the deceased made presents of tobacco to his grandfather, which amounted to from $3 to $3.50 per week, the court said: "There is not a particle of evidence that the grandfather depended upon the alleged contributions of the decedent, or that he had any need of such contributions, and it seems to us that the award, in so far as the grandfather is concerned, is wholly without evidence to establish his dependency. The award, in so far as it makes an allowance to the infant brother and the grandfather, is without evidence to support it, and should be reversed."[66]

Where the deceased husband was living with his mother at the time of the accident, received his mail at her address, and contributed to her support, while his wife lived with her mother and was working, the evidence supported a finding that they were not living together, so as to create a conclusive presumption of dependency.[67]

Where the evidence shows that the beneficiary is old and not capable of attending to her own business, and that an award of a lump sum is desired to enable her to pay debts, the board's determination that such an award would not be for the best interests of the beneficiary was sustained by the evidence.[68]

(1919), 177 N. Y. S. 525. 4 W. C. L. J. 535; Eretza v. Ft. Montgomery Iron Works, 184 N. Y. S. 789, 7 W. C. L. J. 98.

65. Keller v. Indus. Comm., —Ill.—, (1920), 126 N. E. 162, 5 W. C. L. J. 665; Grant v. Kotwall, —Md.—, (1919), 105 Atl. 758, 3 W. C. L. J. 735; Levitan Embroidery Works v. Lamatina, —N. J.—, (1920), 111 Atl. 648, 7 W. C. L. J. 87.

66. Mulraney v. Brooklyn Rapid Transit Co., —App. Div.—, 180 N. Y. S. 654, 5 W. C. L. J. 731; Eretza v. Ft. Montgomery Iron Works, 184 N. Y. S. 789, 7 W. C. L. J. 98.

67. Breakey's Case, —Mass.—, (1920), 126 N. E. 769, 5 W. C. L. J. 865.

68. H. W. Clark Co. v. Indus. Comm., —Ill.—, (1920), 126 N. E. 579, 5 W. C. L. J. 805.

Statements of a bank clerk that the employee made deposits and remittances to his wife, and statements of the deceased that he intended to send money, were held to be competent on the question of dependency, as were also duplicate receipts for postal money orders in favor of the wife, identified by the post office clerk of the office of transmission, as being sent by deceased.[69]

Statements of deceased's brother that he had received letters from his alien parents and that they were living on the remittances sent from America by the brothers, did not show that they were actually dependent upon such remittances, nor did the so-called certificates of "the mayor" and "the official" of a town to the same effect, and stating in addition to the alleged fact that the parents were depending exclusively upon such remittances, that they existed on the fruits of small jobs, being inconsistent, were insufficient to establish dependency.[70]

"Evidence that would sustain the verdict of a jury, if one were rendered upon the proof before the compensation commissioner upon the fact of dependency, where that is the ground on which the claim is predicated, must be regarded as sufficient proof. Poccardi v. Public Service Commission, 75 W. Va. 542, 84 S. E. 242, L. R. A. 1916A, 299. Wherefore, if, upon a submission to a jury, a verdict had been rendered in support of her claim based upon such proof, we would not hesitate to approve the finding. This is a safe and equitable test or criterion in view of the liberality expressed in the statute of this state on the subject."[71]

"The evidence shows that deceased was 22 years old; that he had been in this country about four years; that for the purpose of providing means to procure his transportation from Austria to the United States, his father advanced him the sum of $130, and which he repaid. There is an entire absence of legal evidence tending to show that during said four years of his life spent in

69. In re Fierro's Case , 222 Mass. 378, 111 N. E. 957.

70. Pifumer v. Rheinstien & Has, — App. Div.—, (1919), 175, N. Y. 848, 4 W. C. L. J. 136; Tiene v. Bush Terminal Co., — App. Div. —, 158 N. Y. S. 883, 12 N. C. C. A. 64; Vassilakis v. Fairfax Hotel Co. Inc., 184 N. Y. S. 774, 7 W. C. L. J. 139.

71. Poccardi v. Ott. — W. Va. —, 96 S. E. 790, 2 W. C. L. J. 949, 18 N. C. C. A. 233, 310.

the United States he contributed anything whatsoever to the support of his father, William Pavlovic, or sent him any money other then the $130 in repayment of the loan made. The order made is based solely upon hearsay testimony of Stephen Pavlovic, who filed the application, which is to the effect that deceased deposited his money with him, which in fact is untrue, since it was deposited with his wife, and that he from time to time, at the request of deceased, advanced money to him upon the statement of deceased that he wanted to send money home, and he supposed he did so. But other than what was told him, he knew nothing about it. While section 77, subdivision "a," of the act provides that 'hearsay or testimony not competent to be admitted in a trial in court' may be received, its purpose and effect are restricted to 'statements, written or oral, of a person who is dead, or who cannot after diligent search be found,' and which 'relate directly to the injury in question.' There is nothing in this provision which by any interpretation could warrant a finding that deceased contributed to his father's support by sending him money, the sole basis of which is testimony to the effect that deceased had requested from his depositary an advancement of money, saying that it was intended for such purpose. Conceding the relation of father and son, and that the former was in indigent circumstances, nevertheless there is no evidence whatsoever which tends in the remotest degree to show any recognition of his needs on the part of the son, or that he ever contributed anything whatever to his support." [72]

Evidence that the earnings of deceased's mother were sufficient merely for the support of herself, and that deceased felt himself under a moral obligation to support his brother and did contribute to his support, was sufficient to establish the brother's actual dependency.[73]

72. Western Indem. Co. v. Indus. Acc. Comm.,—Cal. App.—, 169 Pac. 261, 1 W. C. L. J. 300; Eretza v. Ft. Montgomery Iron Works, 184 N. Y. S. 789, (1920), 7 W. C. L. J. 98.

73. O'Flinn's Case,—Mass.—, (1919), 122 N. E. 767, 4 W. C. L. J. 105.

Where the commission ignored evidence of the fact that the applicant, a son 22 years old, was unduly pampered and cared for, when by the exercise of ordinary effort he could care for himself, the court said: "If parental pampering has induced disinclination to labor and fondness for a life free from personal effort, a compensation commissioner is not thereby called upon or justified in either continuing the work the parent has mistakenly begun, or in accepting the conditions as those existing, and therefore to be maintained at the expense of an employer."[74]

In determining whether a father was supported out of the earnings of the deceased or from the rent received from a building, it is a fair inference in the absence of proof, that the expenses of an indebtedness on a house were paid from the rent, these items being sufficient to consume all the rent, a finding that the father depended upon the earnings of the son will therefore be upheld.[75]

The fact of dependency like any other fact must be established by competent evidence, despite the fact that hearings are not to be bound by common law or statutory rules of evidence.[76]

Where brothers of an alien mother heard from her at intervals for nearly 20 years, that it was a matter of family knowledge that the father had deserted her, that she was in poor circumstances, that deceased had been sending her money for her support, and there was positive evidence that deceased did not owe her any money, there was sufficient evidence to uphold a finding of dependency of the mother upon her deceased son.[77]

The court in holding that dependency had not been established said:

74. Gherardi v. Conn. Co., — Conn. —, 103 Atl. 668 2 W. C. L. J. 212, 16 N. C. C. A. 141.

75. Blozina v. Castle Mining Co., —Mich—, (1920), 178 N. W. 57. 6 W. C. L. J. 327.

76. Eretza v. Ft. Montgomery Iron Works, 184 N. Y. S. 789, (1920), 7 W. C. L. J. 98; Hanson v. Flinn-O'Rourke Co., 183 N. Y. S. 213, 6 W. C. L. J. 476.

77. Venuto v. Carter Lake Club,—Neb.—, (1920), 178 N. W. 760, 6 W. C. L. J. 544.

"There is presented to us no competent evidence that the individuals in whose favor this award has been made are the widow and children of James Vassilakis. No witness was sworn before the commission. There was presented to the commission an unverified certificate, purporting to have been signed by the president of the community of Ververato, that 'Demetrios Nicholas Vassilakis' left as his wife and children the individuals for whose benefit an award has been made herein; but the signature of the president of the community is in no way authenticated, except by some individual whose authority to do so is unknown. There was also presented a statement of the widow that she is the wife of 'James (Demetrios) Vassilakis,' and giving the names of their children; but this statement is not verified, and is not even signed in any manner recognized by the laws of this state. There was also submitted the marriage certificate, signed by the priest who performed the marriage ceremony, and certificates of baptism of the children, signed by the priest and godparents. But none of these latter certificates are verified, or purport to be authenticated, in any manner whatever.

"The foregoing documents may constitute evidence in Greece, but no one will contend that they possess that dignity in New York. There should be no great difficulty in establishing by competent evidence the simple facts required in the case; in fact, less difficulty than must have been experienced in collecting the cumbersome documents submitted herein. Section 72, of the act provides for the taking of depositions, and two or three questions properly directed to the widow would doubtless procure all the necessary information. No one better than she can tell the commission that she was the wife of the deceased and the names and ages of their children. The method of procuring such evidence is clearly defined, and it is not unreasonable that the facts should be properly established." [78]

78. Vassilakis v. Fairfax Hotel Co., 184 N. Y. S. 774, (1920), 7 W. C. L. J. 139.

Where the deceased stated upon his employment card that there was no one dependent upon him, it did not amount to conclusive proof that there were no dependents.[79]

§ 525. **Compensation.**—Where the evidence established that the claimant was working under a contract for $2.50 per day there was no ground for justifying an award based upon a weekly wage of $28.84.[80]

"Where it was established by the evidence that the deceased, J. D. Hibbs, had been in the employment of the Midland Bridge Company for about three months or less, and not for a year, and and it is provided by the Texas Workmen's Compensation Act that—

"An 'injured employee who shall not have worked for a year, his average annual wages shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or neighboring place, shall have earned in such employment during the days when so employed.'

"It is also provided, when it is impracticable to compute the average weekly wages, it shall be computed by the board in any manner that may seem just and fair to the parties. There was evidence tending to show that employees of the same class as young Hibbs had received for the entire preceding year $4 or more per day, and consequently appellees were entitled to recover 300 times the sum of $4. The evidence was sufficient to sustain the finding of the jury that $4 a day was earned by those of the same class as J. D. Hibbs, during the preceding year."[81]

Where the injured employee worked only a short time prior to his injury, and the commission based his wages upon the average

79. Northern Redwood Lbr. Co., v. Indus. Comm,—Cal. App.—, 166 Pac. 828, A 1 W. C. L. J. 267.

80. Vaughn v. Barnet Leather Co.,—App. Div.—, (1920), 181 N. Y. S. 721, 6 W. C. L. J. 90.

81. Southern Surety Co. v. Hibbs,—Tex. Civ. App.—, 221 S. W. 303, 6 W. C. L. J. 224.

wages of other employees in the same work by taking the wages of five other employees and finding their average wage, thus finding that at the time of the accident he was making over $30 per week, such determination was supported by the evidence.[82]

In proceedings to recover for permanent partial disability, because of loss of a testicle, compensation was denied in the absence of evidence that it impaired his efficiency as a workmen.[83]

Where counsel for the employer agreed that claimant's wages were $5.60 per day for 250 days, such agreement of itself would furnish sufficient evidence upon which to base an award of $7 per week for permanent partial disability.[84]

Where the evidence showed that the claimant was unable, because of his injury, to secure employment, although if he were able to procure employment, he would be able to perform it, there was sufficient grounds for a finding of total incapacity.[85]

Where the evidence showed that an injury to an employee's hand destroyed fifty per cent of its usefulness, the court said: "If the nature of the injury in such a case, taken as a whole, shows by relation a reduction in the power and usefulness of the hand, as well as an injury to and loss of the fingers, the court may, and properly should, find the fact accordingly." A finding of permanent partial disability was sustained.[86]

Where the evidence shows an injury to an eye by a piece of steel penetrating and passing through the eyeball, so that nothing could have been done to save the eye, failure to give notice to the employer was held not to prejudice his rights.[87]

82. Shaw v. American Body Co., (1919), —App. Div.—, 178 N. Y. S. 369, 5 W. C. L. J. 112.

83. Centlivre Beverage Co. v. Ross, —Ind.—, App.—, (1919), 125 N. E. 220, 5 W. C. L. J. 212.

84. O. W. Rosenthal Co. v. Indus. Comm.,—Ill.—, (1919), 125 N. E. 250, 5 W. C. L. J. 196.

85. Home Life & Acc. Co. v. Corsey, —Tex. Civ. App.—, (1919), 216 S. W. 464, 5 W. C. L. J. 317.

86. State ex rel. Broderick v. District Court, etc.,—Minn.—, (1919), 174 N. W. 826, 5 W. C. L. J. 286.

87. Gibbons v. Continental Iron Works, —App. Div.—, (1919), 179 N. Y. S. 608, 5 W. C. L. J. 432.

Where the medical testimony and that of claimant showed that the claimant had recovered from his injury and was able to go back to work three or four months sooner than he did, an award covering this period was erroneous and excessive.[88]

Where the evidence shows that the payment of compensation in weekly installments would work a hardship, the board in its discretion properly awarded a lump sum.[89]

Where the evidence is conflicting on the question as to the claimant's partial incapacity, a finding that he was unable to earn as much after the accident as before was held proper.[90]

Where the evidence shows that a minor, prior to the injury, was not physically fit for heavy work, and that $15 a week would be his maximum earning power, an award based upon a possible future earning capacity of $18 per week was unwarranted.[91]

The court, in setting aside an award and remitting the matter to the commission for further consideration, said in part: "The award was based upon the reports of physicians and eye specialists; no evidence was produced and no findings as to whether the vision could be corrected by the use of glasses. One report gives the loss at 50 per cent, another at 90 per cent of the normal vision. The award was for total loss. An award based upon this unsatisfactory state of the record should be set aside, and the matter remitted to the commission for further consideration."[92]

Under a statutory provision that a lump sum cannot be awarded where the injury is not ascertainable from an ocular inspection of objective symptoms, evidence of a knife scar several inches long on and above the wrist and consequent stiffness in the hand and fingers as the result of severed tendons, is sufficient evidence

88. France v. Kingston Shipbuilding Corporation, —App. Div.—, 180 N. Y. S. 666, 5 W. C. L. J. 722.

89. Texas Employers' Ins. Ass'n. v. Downing, —Tex. Civ. App.—, (1920), 218 S. W. 112, 5 W. C. L. J. 582.

90. Humphreys v. Chevrolet Motor Car Co., —App. Div.—, (1920), 181 N. Y. S. 3, 5 W. C. L. J. 878.

91. Markowitz v. Watters Laboratories, —App. Div.—, (1920), 181 N. Y. S. 17, 5 W. C. L. J. 882.

92. Cortina v. Lathrop & Shea Co.,—App. Div.—, (1920), 180 N. Y. S. 855, 5 W. C. L. J. 877.

of injury as revealed by objective examination to justify an award.[93]

Where the transcript of the record shows that one physician testified that his services alone would run between $50 and $75, an allowance of $150 for hospital and medical bills was warranted by the evidence.[94]

In reference to proof of dependency of orphans under sixteen years of age, the court, in a Minnesota case, said: "We need not determine whether the evidence justifies a finding that the children were in fact wholly dependent, for section 8208 (1), G. S. 1913, as amended by section 5, chap. 209, Laws 1915 (Gen. St. Supp. 1917, Sec. 8208), provides that minor children under the age of 16 years shall be conclusively presumed to be wholly dependent. The minor children thus referred to are the children of an employee accidentally killed in the course of the employment. The law does not in terms exclude the children of the female employee, and no good reason occurs to us why they should be excluded by construction. That dependents of female employees are intended to be protected by the act is clear, for a dependent husband is specifically provided for in subdivision 11 of said section 5.

"The learned trial court evidently regarded the children as coming within subdivision 10 of the section just referred to, which reads:

'If the deceased employee leave a dependent orphan, there shall be paid forty per centum of the monthly wages of deceased, with ten per cent additional for each additional orphan, with a maximum of sixty per centum of such wages.' "[95]

Proof that an insurance company ratified its voidable policy and paid the claim of an injured employee, is sufficient to entitle it to be subrogated to the employee's rights.[96]

93. Goodwin v. Cudahy Packing Co., —Kan.—, (1919), 180 Pac. 809, 4 W. C. L. J. 192.

94. Villalobos v. Cudahy Packing Co., — Kan. —, (1919), 181 Pac. 619, 4 W. C. L. J. 385.

95. State ex rel. Radisson Hotel v. District Court of Hennepin County, — Minn. —, (1919), 172 N. W. 897, 4 W. C. L. J. 418.

96. Royal Indem. Co. v. Midland Counties Pub. Serv. Corp.,—Cal. App. —, (1919), 183 Pac. 960, 4 W. C. L. J. 689.

The court, in holding that there was evidence to sustain a finding that the claimant made his claim for compensation within the six months period, said, that it was sufficient if the employer was informed by the employee that he intended to claim the benefit of the act, even though such notice was verbal.[97]

In a Massachusetts case the question arose whether the injured employee was entitled to double compensation as provided in the act when the employer is guilty of "serious and willful misconduct" the court said: "The words 'serious and willful misconduct' of a subscriber, as used in the act, have been interpreted by this court as meaning something more than mere negligence or even gross or culpable negligence; they are defined as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences.' Burns' Case, 218 Mass. 8, 10, 105 N. E. 601, 602 Ann. Cas. 1916A, 787."[98]

§ 526. **Willful Misconduct of Employer.**—On the question of the sufficiency of the evidence to prove the employer guilty of serious and willful misconduct, the court, in a California case, said: "Serious misconduct" of an employer must therefore be taken to mean conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees. It seems clear that according to this test, the commission was amply warranted in finding that the maintenance of the improperly protected shafting, immediately over, and in close proximity to, the conveyor belt, was such serious misconduct." * * * "Under the evidence the finding of serious misconduct implies that the conditions of the employment were patently unsafe. If this be true, we know of no rule under which petitioner may claim that,

97. Moustgaard v. Industrial Comm., —Ill.—, (1919), 122 N. E. 49, 3 W. C. L. J. 600; Suburban Ice Co. v. Indus. Bd., 274 Ill. 630, 113 N. E. 979, 14 N. C. C. A. 132, 777, 1080; Conway Co. v. Indus. Bd., 282, Ill. 313, 118 N. E. 705, 16 N. C. C. A. 745.

98. Beckles' Case,—Mass.—, 119 N. E. 653, 2 W. C. L. J. 278, 17 N. C. C. A. 434.

passing for the time being the question of the penalty, it is not primarily liable for resulting injuries. It is so well settled as to require no citation of authority that petitioner was charged with the duty of maintaining a safe place for its employees to work, and we do not think it can be said the evidence is insufficent to establish serious misconduct, in that petitioner's officers knew or ought to have known, if they had turned their minds to consider the matter, of the condition under which Mrs. Hamilton was required to work."[99]

PRESUMPTIONS.

§ 527. **Presumption that Injury Arose out of the Course of the Employment.**—Where an employee was sent to unload trucks, and twice telephoned his employer of their non-arrival, and was killed in a nearby railroad yard where he might have gone to telephone, it was presumed that his presence at the place of the accident was in the interests of his employer.[1]

In a New York case the court said: "The decedent, apparently while on his way to that part of the employer's plant where his services were to begin presently, was passing down an alley between rows of machinery, when he was warned of an approaching electric truck from the rear. In stepping aside, he appears to have reeled and walked backward upon his heels, falling in such a manner as to produce a fracture of the skull resulting in death some hours later. While it is highly probable that, had he been perfectly sober, the accident would not have occurred, the statute provides that, in order to forfeit the benefits of the act, the injury must result 'solely from the intoxication of the injured employee while on duty.' New York Workmen's Compensation Law, Sec. 10. No such condition is shown by the evidence; certainly the presumption is not overcome, and the award must be sustained. The injury occurred upon the premises of the employer, ap-

99. E. Clemens Horst Co. v. Indus. A. C. of Cal., — Cal. —, 193 Pac. 105, 7 W. C. L. J. 3.

1. Smith v. A. M. Oesterheld & Son, — App. Div. —, (1919), 179 N. Y. S. 10, 5 W. C. L. J. 445.

parently while the decedent was about to take up the duties of his employment, and the presumptions of section 21, as well as the adjudications (Murphy v. Ludlum Steel Co., 182 App. Div. 139, 169 N. Y. Supp. 781), support the conclusions of the commission. The award should be affirmed."[2]

A party found dead at a place where he was supposed to be during the course of his employment, will be presumed to have been killed in the course of his employment.[3]

The commission erred in presuming that, because the employee had a cut or pimple on his neck while working in a tannery and died of anthrax, he had received an injury arising out of the employment.[4]

Where an employee, who was subject to fits, was drowned in five feet of water, it cannot be presumed that he met death by an accident arising out of the employment, since the only reasonable inference is that he met his death as the result of an attack of his constitutional malady. The cause of an accident cannot be presumed, but must be established.[5]

Where a railroad section foreman was killed by a car belonging to his employer while waiting to direct men to their work, and it was not affirmatively shown that the deceased was connected with

2. Richards v. N. Y. Air Brake Co., — N. Y. App. —, (1919), 179 N. Y. S. 317, 5 W. C. L. J. 443.

3. Donlon v. Kips Bay Brewing & Malting Co., —App. Div.—, 179 N. Y. S. 93, 5 W. C. L. J. 429, (1919); Flucker v. Carnegie Steel Co., — Pa. —, (1919), 106 Atl. 192, 3 W. C. L. J. 780, 18 N. C. C. A. 1056; Saunders v. New England Collapsible Tube Co., —Conn.,—, (1920). 110 Atl. 538, 6 W. C. L. J. 271; Sparks Milling Co. v. Indus. Comm., —Ill.—, (1920), 127 N. E. 737, 6 W. C. L. J. 299.

4. Eldridge v. Endicott, Johnson & Co., —App. Div.—, (1920), 126 N. E. 254, 5 W. C. L. J. 716.

5. Minerly v. Kingsbury Const. Co., —App. Div.—, (1920), 181 N. Y. S. 901, 6 W. C. L. J. 83; Eldridge v. Endicott, Johnson & Co., 228 N. Y. 21, 126 N. E. 254; Collins v. Brooklyn Gas Co., 171 App. Div. 381, 156 N. Y. S. 957; White v. American Society for the Prevention of Cruelty to Animals, 191 App. Div. 6, 180 N. Y. S. 867; Nestor v. Pabst Brewing Co., 191 App. Div. 312, 181 N. Y. S. 477; Woodruff v. H. R. Howes Construction Co., 228 N. Y. 276, 127 N. E.—; Hansen v. Turner Const. Co., 224 N. Y. 331, 120, N. E. 693.

interstate commerce, a finding that the accident arose out of the employment will not be disturbed.[6]

Where an employee engaged as a brakeman is killed in a railroad's yards, there is no presumption as to the character of his employment, and an employer claiming that he was engaged in interstate commerce has the burden of proof.[7]

Since a hernia can be caused by natural causes as well as result from an accident, the claimant must offer evidence that the employment caused or could have caused the injury, since there is no presumption that it so arose out of the employment.[8]

The court, in holding that the employee's death was caused by an accident arising out of the employment, said: "It is said Hollenbach's death did not result from electric shock because the voltage (114) was not sufficient to produce death. Decedent was a strong, able-bodied man in the full enjoyment of his faculties at the time the current struck him. The voltage may have been less than is usually found to produce death. The wire burned into his flesh. The current was so powerful that the other workmen could not take hold of his body long enough to remove him from the wire. He died under the current. In such cases the presumption is that the accident was the cause of death, and this presumption will prevail unless overcome by evidence."[9]

Where a master has rejected the Iowa act it is presumed that he has been negligent, where an injury, has occurred which could have resulted from his negligence, and the burden of overcoming this presumption rests upon him. The court said: "It is not a question whether plaintiff has shown the above mentioned matters were the cause of the injury, but rather whether defendant has

6. Saccomanno v. Grasse River Ry. Corp.,—App. Div.—, (1920), 182 N. Y. S. 23, 6 W. C. L. J. 205.

7. Polke v. Phil. & R. Ry. Co., —Pa.—, (1920), 109 Atl. 627, 5 W. C. L. J. 896.

8. Alpert v. J. C. & W. E. Powers, —N. Y. App. Div.—, 119 N. E. 229, 2 W. C. L. J. 106, 17 N. C. C. A. 248, 253, 789. But see section 21 of New York Acts and Matter of Collins v. Brooklyn Union Gas Co. 171 App. 381, 156 N. Y. Supp. 957.

9. Phil Hollenbach Co. v. Hollenbach,—Ky. App.—, 204 S. W. 152, 2 W. C. L. J. 492, 16 N. C. C. A. 879.

shown they were not the cause thereof, and whether defendant has overcome the presumption raised by the statute. Under the record, we think this was a question for the jury. It may be, as contended by appellee, that defendant is not required to prove exactly how the accident happened, or to furnish a satisfactory explanation of it, but it is sufficient if it proves that the accident did not result from negligence on its part. But it was incumbent upon defendant to overcome the presumption of negligence by negativing every fact which would justify a finding of negligence on its part. Stewart v. Railway, 136 Iowa, 182, 113 N. W. 764."[10]

Where the employee was acting within the scope of his employment at the time of an alleged injury, it will be presumed that the injury was due to an accident which arose out of the employment, but this presumption is rebuttable.[11]

Where an employee dropped dead while working about the uninsulated end of an electric cable, and the evidence showed that prior to his death he had always been in good health, the court held that there was a reasonable presumption that he was killed by some external efficient agency.[12]

Where an autobus driver was injured in the course of his employment under circumstances that would bring the accident within the class of hazards incident to the operation of motor vehicles, there is a presumption that the injury arose out of the employment.[13]

§ 528. **Acceptance of Act.**—Most elective acts provide that in the absence of a notice in writing that the provisions of the act

10. Mitchell v. Des Moines Coal Co., — Ia. —, 165 N. W. 113, 1 W. C. L. J. 200, 17 N. C. C. A. 531. See also, Mitchell v. Phillips, Mining Co., —Ia.—, 165 N. W. 108, 1 W. C. L. J. 200.

11. Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, 14 N. C. C. A. 426; McCabe v. Brooklyn Heights R. Co., —App. Div.—, 162 N. Y. S. 741, 14 N. C. C. A. 427; Sullivan v. Indus. Engineering Co., 173 App. Div. 65, 158 N. Y. S. 970, 14 N. C. C. A. 427.

12. Bloomington D. & C. R. Co. v. Indus. Bd., 276 Ill. 454, 114 N. E. 939, 14 N. C. C. A. 426.

13. Thistle Mills v. Sparks, — Md. App. —, 111 Atl, 769, 7 W. C. L. J. 306.

are rejected, the employer and employee are presumed to have accepted the act and are bound thereby.[14]

In an Illinois case the court said: "Plaintiff in error argues that the presumption that a person engaged in one of the hazardous occupations enumerated in the statute is under and subject to the act applies only as between the employer and the employee, but does not apply where the action is against a third party. This question was decided contrary to that contention in Johnson v. Choate; 284 Ill. 214, 119 N. E. 972."[15]

§ 529. **As to Dependency.**—No legal presumption can be drawn from the fact of the payment of two separate sums of money to the father, 84 years old, by his son 32 years old, that the payment was made to assist the father in his support rather than to pay an ordinary debt for service rendered or for money loaned.[16]

A showing that decedent's widow was living with him at the time of his death, establishes a conclusive persumption under the Wisconsin Act that she was wholly dependent upon him for support, notwithstanding that she had property of her own.[17]

There is no presumption of dependency of the parents of a deceased employee 32 years old, and hardly a presumption of their existence, where their residence is in a foreign country.[19]

A widow living with her husband at the time of the accident, and a son of the deceased, by a former wife, under 18 years of age, though not living, with him is under the Massachusetts Act

14. Buonfiglio v. Neumann & Co., —N. J. App.—,(1919), 107 Atl. 285, 4 W. C. L. J. 521.

15. Vose v. Central Ill. Pub. Serv. Co., —Ill.—, (1919), 122 N. E. 134, 3 W. C. L. J. 613. For a more comprehensive discussion of this subject see Section 6.

16. Peabody Coal Co. v. Indus. Comm., —Ill.—, (1919), 124 N. E. 603, 5 W. C. L. J. 57.

17. Belle City Malleable Iron Co. v. Indus. Comm., —Wis.—, (1919), 174 N. W. 899, 5 W. C. L. J. 333; Bott's Case, —Mass.—, 119 N. E. 755, 2 W. C. L. J. 273.

18. Pifumer v. Rheinstein & Haas, Inc., —App. Div.—, (1919). 175 N. Y. S. 848, 4 W. C. L. J. 136.

conclusively presumed to be wholly dependent upon the deceased servant.[19]

It cannot be presumed that a house in which the members of the deceased's family were living at the time of his death was worthless, so as to make them totally dependent.[20]

There is no presumption that parents are dependent upon a son 19 years old, from the mere fact of family relationship between them.[21]

§ 530. **As to Existence of Beneficiaries.**—As to the presumption of the existence of dependents for whom compensation is claimed, it was held in Illinois that where the aged alien parents were seen at their residence in Russian Poland in August 1915, the presumption of continuance of life is insufficient to establish the existence of beneficiaries 26 months later. That country having in the meantime been overrun by hostile armies and devastated and robbed of the means of subsistance. The fact of the existence of the beneficiary at the time of the hearing must be affirmatively shown by the applicant.[22]

§ 531. **As to Notice.**—There is a presumption that an employer is prejudiced by a failure to give notice of the injury within the prescribed time.[23]

§ 532. **As to Wages.**—It is to be presumed that the wages of an employee in a particular employment are shown by the pay roll.[24]

§ 533. **Of Contract of Employment.**—"For the purposes of the Workmen's Compensation Act the relation of employer and

19. Holmberg's Case, —Mass.—, 120 N. E. 353, 2 W. C. L. J. 899.

20. In re Derinza, —Mass.—, 118 N. E. 942, 16 N. C. C. A. 210.

21. Milwaukee Basket Co. v. Indus. Comm., —Wis.—, (1921), 181 N. W. 308.

22. National Zinc. Co. v. Indus. Comm., —Ill.—, (1920), 127 N. E. 135, 6 W. C. L. J. 21.

23. Andrews v. Butler Mfg. Co., —App. Div.—, 172 N. Y. S. 405, 3 W. C. L. J. 173.

24. King's Case, —Mass.—, (1919), 125 N. E. 153, 5 W. C. L. J. 256.

employee is created in every instance by contract, either express or implied. Rogers v. Rogers, 122 N. E. 778; Rongo v. Waddington, 87 N. J. Law, 395, 94 Atl. 408; Kirkpatrick v. Industrial Accident Commission, 31 Cal. App. 668, 161 Pac. 274.

"In all probability the relation between Nissen and Miller was created by an express contract; for it is incredible that they would have adopted the plan disclosed by the evidence without a clear and definite agreement. There being no evidence of a written contract, the presumption prevails that the contract, if expressed, was oral. If the exact conversation which took place between the two men at the very inception of that relationship had been proved, it would have been helpful to the board in determining the merits of the controversy. In the absence of any testimony on that feature the board had to determine what relation the two men sustained to each other wholly from their conduct and from all the circumstances disclosed by the evidence. The board reached a legitimate conclusion, and this court will not disturb it."[25]

§ 534. **Against Self Infliction of Injuries.**—There is a presumption that the deceased did not seek to destroy himself.[26]

§ 535. **Of Death.**—Where the circumstances surrounding a night-watchman's death pointed strongly to murder, but the *corpus delicti* was never discovered, the court held, that, despite the presumption that an absent person was considered alive for seven years, death might be presumed in the present case.[27]

25. Nissen Transfer & Storage Co. v. Miller, —Ind. App.—, (1920), 125 N. E. 652, 5 W. C. L. J. 519.

26. Wishcaless v. Hammond, Standish & Co., 201 Mich. 192, 166 N. W. 993, 17 N. C. C. A. 247; Bekkedal Lumber Co. v. Indus. Comm., —Wis.—, 169 N. W. 561, 17 N. C. C. A. 248; State ex rel. Oliver Mining Co. v. District Court, —Minn.—, 164 N. W. 582, 15 N. C. C. A. 526; Northern Pac. S. S. Co. v. Ind. Comm., —Cal.—, 163 Pac. 910, 14 N. C. C. A. 425, A 1 W. C. L. J. 170; In re Von Etta, — Mass., —, 111 N. E. 696, 12 N. C. C. C. 551; Sparks Milling Co. v. Indus. Comm., —Ill.—, (1920), 127 N. E. 737, 6 W. C. L. J. 299.

27. Western Grain & Sugar Products Co. v. Pillsbury, — Cal. —, 159 Pac. 423.

Where a steamer was carried away by ice, and no word was received concerning its whereabouts for ninety days, it will be assumed that its passengers are dead and compensation will be awarded.[28]

§536. **Date of Filing Claim.**—Where a mother filed a claim for compensation, with no indorsements indicating the date of filing, it will be presumed, in the absence of direct proof to the contrary that the claim was filed within the proper time.[29]

BURDEN OF PROOF.

§ 537. **General.**—Where the employer resists the payment of compensation awarded, on the ground that deceased was engaged in interstate commerce, the burden of proving this alleged fact is upon the employer.[30]

The burden is on the claimant to prove the employment and accidental injury arising out of and in the course of the employment.[31]

28. In re Wm. Rose, 2nd A. R. U. S. C. C. 72.

29. Hanson v. Flinn O'Rourke Co., 183 N. Y. S. 213, 6 W. C. L. J. 476.

30. Knorr v. Central Railroad of New Jersey, —Pa.—, (1920), 110 Atl. 797, 6 W. C. L. J. 497; Payne v. Indus. Comm., --Ill.—, (1921), 129 N E. 830; Linway v. Penn. Co., —Pa.—, (1920), 112 Atl. 40; Atchison T. & S. F. R. Co. v. Indus. Comm., —Ill.—, (1919), 125 N. E. 380, 5 W. C. L. J. 364; Smith v. Phil. & R. Co., —Pa.—, (1920), 110 Atl. 142, 6 W. C. L. J. 213; Polk v. Phil. & R. Ry. Co., — Pa.—, (1920), 109 Atl. 627, 5 W. C. L. J. 896; Aisenberg v. C. F. Adams Co., (1920), 111 Atl. 591, —Conn.—, 7 W. C. L. J. 28.

31. Consumer's Mutual Oil Producing Co. v. Indus. Comm., —Ill. —, (1919), 124 N. E. 608, 5 W. C. L. J. 31; Sugar Valley Coal Co. v. Drake, —Ind. App.—, 117 N. E. 937, 17 N. C. C. A. 254; New Castle Foundry Co. v. Lysher, —Ind. App.—, 120 N. E. 713, 17 N. C. C. A. 251; Zietlow v. Smock, —Ind. App.—, 117 N. E. 665, 17 N. C. C. A. 255; Spring Valley Coal Co. v. Indus. Comm., —Ill.—, (1919), 124 N. E. 545, 5 W. C. L. J. 64; Marshall v. Baker Vawter Co., —Mich.—, (1919), 173 N. W. 191, 4 W. C. L. J. 399; Central Garage of La Salle v. Indus. Comm., —Ill.—, (1919), 121 N. E. 587, 3 W. C. L. J. 428, 18 N. C. C. A. 1053; Morris & Co. v. Indus. Comm., —Ill.—, (1920), 128 N. E. 727.

Where it is shown that an engine hostler was killed in the course of his employment from a bullet wound, the burden of proving that the killing "was because of personal reasons" within the meaning of the exception of the Pennsylvania Act, instead of reasons in connection with the employment, rests upon the employer.[32]

While the petitioner must prove every fact necessary to an award, still he need not prove that at the time of the accident he was not engaged in work wholly unconnected with the employment, for he is not required to prove a negative.[33]

"It is now well established that a claimant must prove an accident arising out of and in the course of the employment, and that he cannot rely on the presumption of section 21 of the workmen's Compensation Law (Consol. Laws, c. 67) as a substitute for such proof. Matter of Collins v. Brooklyn Union Gas. Co., 171 App. Div. 381, 156 N. Y. Supp. 957; Matter of Eldridge v. Endicott, Johnson & Co., 228 N. Y. 21, 126 N. E. 254.

"It is equally well settled that in making such proof a claimant must produce some legal evidence, and cannot rely exclusively on hearsay testimony. Matter of Belcher v. Carthage Machine Co., 224 N. Y. 326, 120 N. E. 735; Matter of Hansen v. Turner Construction Co., 224 N. Y. 331, 120 N. E. 963; Matter of Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507, Ann Cas. 1918B, 540. The claim of an accident causing an abrasion must therefore fail."[34]

7 W. C. L. J. 41; Gale v. Munroe, 184 N. Y. S. 413, 7 W. C. L. J. 106, (1920).

32. Keyes v. New York, O. & Ry. Co., —Pa.—, (1919), 108 Atl. 406, 5 W. C. L. J. 464.

33. Brown v. Bristol Last Block Co., —Vt.—, (1920), 108 Atl. 922, 5 W. C. L. J. 628.

34. White v. American Society for the Prevention of Cruelty to Animals, — N. Y. App. Div. —, (1920). 180 N. Y. S. 867. 5 W. C. L. J. 874; Alpert v. Powers, —N. Y. App. Div.—, 119 N. E. 229, 2 W. C. L. J. 106, 17 N. C. C. A. 248, 253, 789.

The burden of proving that the injury arose out of and in the course of the employment, and every other fact necessary to a legal award, rests upon the petitioner.[35]

35. Swing v. Kokomo Steel & Wire Co., —Ind. App.—, 125 N. E. 471, 5 W. C. L. J. 380; Hydrox Chemical Co. v. Indus. Comm., —Ill.—, (1920), 126 N. E. 564, 5 W. C. L. J. 811; Joseph Halsted Co. v. Indus. Comm., —Ill.—, (1919), 122 N. E. 822, 4 W. C. L. J. 24; Mailman v. Record Foundry & Machine Co., —Me.—, (1919), 106 Atl. 606, 4 W. C. L. J. 205; Chicago A. R. Co. v. Indus. Bd., 274 Ill. 336, 113 N. E. 629; Bloomington D. & C. R. Co. v. Indus. Bd., 276 Ill. 454, 114 N. E. 939; Dragovich v. Iroquois Iron Co., 269 Ill. 478, 109 N. E. 999, 10 N. C. C. A. 475; Dow's Case, —Mass.—, 121 N. E. 19, 3 W. C. L. J. 144, 17 N. C. C. A. 940; David Bradley Mfg. Works v. Indus. Bd., 288 Ill. 468, 119 N. E. 615, 2 W. C. L. J. 226, 17 N. C. C. A. 250; Murphy's Case, —Mass.—, 2 W. C. L. J. 270, 119 N. E. 657, 18 N. C. C. A. 302; In re Savage, 222 Mass. 205, 110 N. E. 283; In re Von Ette, 223 Mass. 56, 111 N. E. 696, 12 N. C. C. A. 551; Hallet's Case, —Mass.—, 119 N. E. 673, 2 W. C. L. J. 281, 16 N. C. C. A. 755; Mountain Ice Co. v. Court of Common Pleas, —N. J.—, 103 Atl. 912, 2 W. C. L. J. 532, 16 N. C. C. A. 932; Robinson v. State, —Conn.—, 104 Atl. 491, 2 W. C. L. J. 779, 17 N. C. C. A. 251, 954; Tackles v. Bryant & Detwiler Co., 200 Mich. 350, 167 N. W. 36, 17 N. C. C. A. 250; Griffith v. Cole Bros., —Iowa—, 165 N. W. 577, 15 N. C. C. A. 674; Northern Illinois Light & Traction Co. v. Indus. Bd., 279 Ill. 565, 117 N. E. 95, 15 N. C. C. A. 159; Savoy Hotel Co. v. Indus. Bd., 279 Ill. 329, 116 N. E. 712, 15 N. C. C. A. 233; Robinson v. State, —Conn.—, 104 Atl. 491, 17 N. C. C. A. 251, 15 N. C. C. A. 159; Inland Steel Co. v. Lambert, —Ind. App.—, 120 N. E. 713; New Castle Foundry Co. v. Lysher, —Ind. App.—, 120 N. E. 713, 17 N. C. C. A. 251; Bucyrus Co. v. Townsend, —Ind. App.—, 117 N. E. 656, 17 N. C. C. A. 251; Guthrie v. Detroit Shipbuilding Co., 200 Mich. 355, 167 N. W. 37, 15 N. C. C. A. 251; Modra v. Little, 223 N. Y. 452, 119 N. E. 853, 17 N. C. C. A. 255; In re Bean, 227 Mass. 558, 116 N. E. 826, 17 N. C. C. A. 256; Armour & Co. v. Indus. Bd., 273 Ill. 590, 113 N. E. 138; De Mann v. Hydraulic Engineering Co., —Mich. —, 159 N. W. 380; Corral v. Wm. H. Hamlyn & Son, —R. I.—, 94 Atl. 877, 14 N. C. C. A. 427; Albaugh-Dover Co. v. Indus. Bd., 278 Ill. 179, 115 N. E. 834, 14 N. C. C. A. 427; Trigg v. Vauxhall Motors, Ltd., (1914), 7 B. W. C. C. 462, 14 N. C. C. A. 428; Union Sanitary Mfg. Co. v. Davis, —Ind. App.—, 115 N. E. 676, 14 N. C. C. A. 428; Draper v. Regents of Univ. of Mich., —Mich.—, 161 N. W. 956, 14 N. C. C. A. 428; In re Sanderson, 224 Mass 558, 113 N. E. 355; Linnane v. Aetna Brwy. Co., —Conn.—, 99 Atl. 507, 14 N. C. C. A. 429; Zwaduk v. Morris & Co., —Kan.—, (1921), 187 Pac. 868; Vulcan Detinning Co. v. Indus.

When the facts admit of an inference that the accident arose out of the employment, the burden of proving the contrary rests upon the employer.[36]

So, where the employer sought to defeat an award on the ground that the plant was not in operation at the time of the accident, the burden of proving such fact rested upon the employer.[37]

Claimant has the burden of proving his case, but evidence sufficient to make a reasonable person conclude that applicant was injured under circumstances entitling him to compensation is sufficient.[38]

Comm., —Ill.—, 128 N. E. 917, 7 W. C. L. J. 191; Milwaukee Basket Co. v. Indus. Comm., —Wis.—, (1921), 181 N. W. 308; Steel Sales Corp. v. Indus. Comm., —Ill.—, 127 N. E. 698, 6 W. C. L. J. 303; Saunders v. New England Collapsible Tube Co., —Conn.—, 110 Atl. 538, 6 W. C. L. J. 538; Zietlow v. Smock, —Ind. App.—, 117 N. E. 665, 1 W. C. L. J. 174; Dulac v. Dumbarton Woolen Mills Co., —Me.—, (1921), 112 Atl. 710; Miller v. Gardner & Lindberg, —Iowa—, (1921), 180 N. W. 742; Woodcock v. Dodge Bros., —Mich.—, (1921), 181 N. W. 776.

36. Wischcaless v. Hammond, Standish & Co., 201 Mich. 192, 166 N. W. 993, 17 N. C. C. A. 252; Jewel Tea Co. v. Weber, — Md. —, 103 Atl. 478, 17 N. C. C. A. 252; Coastwise Shipping Co. v. Tolson, — Md. —, 103 Atl. 476, 17 N. C. C. A. 252; Papinaw v. Grand Trunk Ry. Co. of Canada, — Mich. —, 155 N. W. 545, 12 N. C. C. A. 243.

37. Kobyra v. Adams, —N. Y. App. Div.—, 162 N. Y. S. 269, 14. N. C. C. A. 430.

38. Swift & Co. v. Indus. Comm., — Ill. —, (1919), 122 N. E. 796, 4 W. C. L. J. 35; Westman's Case, — Me. —, (1919), 106 Atl. 532, 4 W. C. L. J. 213; Chicago Great Western Ry. Co. v. Indus. Comm., — Ill. —, 120 N. E. 508, 3 W. C. L. J. 14, 17 N. C. C. A. 255; New Castle Foundry Co. v. Lysher, — Ind. App. —, 120 N. E. 713, 3 W. C. L. J. 119, 17 N. C. C. A. 251, 291; Ginsberg v. Burroughs Adding Machine Co., — Mich. —, 170 N. W. 15, 3 W. C. L. J. 317, 18 N. C. C. A. 314; Hege & Co. v. Tompkins, — Ind. App. —, (1919), 121 N. E. 677, 3 W. C. L. J. 451; Rish v. Iowa Portland Cement Co., — Ia. —, (1919), 170 N. W. 532, 3 W. C. L. J. 463, 18 N. C. C. A. 1033; H. W. Nelson R. Const. Co. v. Indus. Comm., — Ill. —, (1919), 122 N. E. 113, 3 W. C. L. J. 605, 18 N. C. C. A. 1036; John A. Roebeling's Sons Co. v. Indus. Comm., Cal. App. —, 171 Pac. 987, 2 W. C. L. J. 38, 16 N. C. C. A. 891; Steel Sales Corp. v. Indus. Comm., — Ill. —, (1920), 127 N. E. 698, 6 W. C. L. J. 303.

The burden of proving that the claim was made within the time limit, rests upon the claimant.[39] Also that notice was given within the proper time.[40] But a claimant need not prove a negative.[41]

The employer has the burden of proving that he was prejudiced by a failure to give notice of the accident.[42]

The burden of proving dependency rests upon the claimant, and in claiming benefits the claimant must bring himself within the provisions of the act.[43]

The burden of proving that the employment was casual rests upon the employer.[44]

The burden of proving that he was an assenting employer under the act is upon the employer. But the burden is not on the employer to prove that he is an employer of less than five employees, for if he is, the burden is upon the employee to absolve himself from contributory negligence.[45]

The burden of proving that the claimant was engaged in interstate commerce at the time of the accident, rests upon the employ-

39. Heed v. Indus. Comm., — Ill. —, (1919), 122 N. E. 801, 4 W. C. L. J. 27.

40. In re Murphy, — Mass. —, 115 N. E. 40, A 1 W. C. L. J. 845.

41. Brown v. Bristol Last Block Co., — Vt. —, 108 Atl. 922, 5 W. C. L. J. 628.

42. A. Breslauer Co. v. Indus. Comm., 167 Wis. 202, 167 N. W. 256, 2 W. C. L. J. 189, 18 N. C. C. A. 235.

43. Peabody Coal Co. v. Indus. Comm., — Ill. —, (1919), 124 N. E. 603, 5 W. C. L. J. 57; In re Stewart, — Ind. App. —, (1920), 126 N. E. 42, 5 W. C. L. J. 514; Drummond v. Isbell Porter Co., — App. Div. —, (1919), 177 N. Y. S. 525, 4 W. C. L. J. 535; Chaudier v. Sterns & Culver Lbr. Co., — Mich. —, (1919), 173 N. W. 198, 4 W. C. L. J. 508; Benjamin F. Shaw Co. v. Palmatory, — Delaware —, (1919), 105 Atl. 417, 3 W. C. L. J. 424; Haskell & Barker Car Co. v. Brown, — Ind. App. —, 117 N. E. 555, 1 W. C. L. J. 48, 18 N. C. C. A. 214, 232; In re Derinza, — Mass. —, 118 N. E. 942, 16 N. C. C. A. 210; H. G. Goelity Co. v. Indus. Bd., 278 Ill. 164, 115 N. E. 855. See Section 367, Dependency.

44. Consumer's Mut. Oil Co. v. Indus. Comm.. — Ill. —, (1919), 124 N. E. 608, 5 W. C. L. J. 31; Chicago G. W. R. Co. v. Indus. Comm., 284 Ill. 537, 120 N. E. 508, 17 N. C. C. A. 255.

45. Nadeau v. Caribon Light & Power Co., — Me. —, (1919), 108 Atl. 190, 5 W. C. L. J. 238.

er, when he seeks to defeat a claim for compensation on this ground.[46] There is no presumption that a brakeman is so engaged.[47].

"The rule is that the burden is upon the petitioner in the court of first instance to prove a case within the state statute; that is to show affirmatively that the decedent was engaged at the time of the accident in a service which was not regulated by the federal statute; for that fact is not to be presumed in the absence of proof. Lincks v. Erie Railroad Co., 91 N. J. Law, 166, 103 Atl. 176." [48]

Where an employee is loaned to operate his employer's machine, there is a rebuttable presumption that he remains the employee of the owner of the machine.[49]

"There are legal presumptions which may be properly considered. 'In human experience it is the common desire and effort to preserve life rather than destroy it, and hence the law, where a person is found dead, imputes to the circumstances the prima facie significance that death was caused by accident rather than suicide, and that presumption persists in its legal force to negative the fact of suicide until overcome by evidence.' Milwaukee Western Fuel Co. v. Industrial Commission of Wisconsin, 159 Wis. 635, 150 N. W. 998. Under this rule of presumption it was held in Steers v. Dunnewald, 85 N. J. Law, 449, 89 Atl. 1007, that the death under consideration must have arisen from either accident, suicide, or murder, and added, 'Suicide and murder involve criminal acts, and crime is not to be presumed. The only other alternative is accident.' In short, the amount of evidence, circumstantial as well as direct evidence, together with proper legal

46. Fish v. Rutland R. Co., — N. Y. —, (1919), 178 N. Y. S. 439, 5 W. C. L. J. 98; Di Donato v. Phil. & R. Ry. Co., — Pa. —, (1920), 109 Atl. 627, 5 W. C. L. J. 897; Ill. Cent. Ry. Co. v. Indus. Bd., —, Ill. —, 119 N. E. 920, 2 W. C. L. J. 444, 18 N. C. C. A. 910; Rockford City Traction Co. v. Indus. Comm., — Ill. —, (1920), 129 N. E. 135, 7 W. C. L. J. 283.

47. Polk v. Phil. & R. Ry. Co., — Pa. —, 109 Atl. 627, 5 W. C. L. J. 896.

48. Carberry v. Delaware. L. & Western R. Co.. —N. J. App.—, (1919), 108 Atl. 364, 5 W. C. L. J. 419.

49. Emach's Case, —Mass,—, (1919), 123 N. E. 86, 4 W. C. L. J. 94.

presumptions, are all to be taken into consideration when investigating the question whether any evidence was before the commissioner upon which he might properly find a verdict."[50]

The burden of proving that the employee was intoxicated to a degree that the intoxication was the proximate cause of the injury, rests upon the employer.[51]

"To prove that defendant had elected not to come under the Workmen's Compensation Act, the plaintiff introduced two documents certified by the secretary of state as part of his office files, one of which recited that the Atchison, Topeka & Santa Fe Railway Company, etc., 'hereby elects not to accept any of the provisions of House Bill No. 858' (the Compensation Act of 1911, as amended in 1913), etc. (Signed) 'The Atchison, Topeka & Santa Fe Railway Company, E. L. Copeland, Secretary and Treasurer.'

"The second was to the same effect, but of a date subsequent to amendments of 1917 to the compensation act, and signed in the same manner. Defendant contends that these documents were insufficient to prove that the railway corporation, had elected not to come under the provisions of the act, since a corporation's secretary and treasurer is not an officer clothed with such managerial and executive powers as to authorize him to speak for the corporation on a subject unrelated to his ordinary duties.

"This contention is not incorrect as a principle of abstract law, but here the defendant had permitted this officer to make and file with the secretary of state these documents of election, one in 1913 and the other in 1917. That the documents were genuine, and that they were sufficient in form and test to serve the purpose of those who might need to examine and act upon them, was determined by the secretary of state when he accepted them from the corporation's officer and filed them in his office. Moreover,

50. Westman's Case, —Me.—, (1919), 106 Atl. 532, 4 W. C. L. J. 213,

51. State ex rel. London & Lancashire Indemnity Co. of America v. District Court, —Minn.—, (1919), 170 N. W. 218, 3 W. C. L. J. 337. 17 N. C. C. A. 790, 958, 18 N. C. C. A. 576; Hartford Acc. & Indem. Co. v. Durham, —Tex. Civ. App.—, (1920), 222 S. W. 275, 6 W. C. L. J. 395.

the election was pleaded in plaintiff's petition, and defendant's unverified general denial would not fairly raise the question of the secretary treasurer's want of power. If plaintiff's pleading on this matter, based as it was in reliance upon what the files of the secretary of state disclosed, did not correctly state defendant's attitude under the compensation act, the true state of facts was peculiarly within the knowledge of the defendant and not readily accessible to plaintiff, and it was the duty of the defendant to plead the facts. Moreover, defendant's answer contained allegations of assumption of risk, etc., which would be altogether out of place if defendant was operating under the compensation act. Under all these considerations, the court holds that no error occurred in admitting this evidence. 3 Wigmore on Evidence, Sec. 2158, 2159."[52]

Where an employee contends that his temporary total disability continued after his physician had pronounced him fit to return to work, the burden of proving that his disability did continue thereafter rests with the claimant.[53]

The burden of proving that the employee was guilty of wilful misconduct rests upon the employer.[54]

The burden of proof rests upon the party appealing whether claimant or defendant.[55]

The party seeking an award in a lump sum has the burden of establishing the right to make payment in such manner.[56]

52. Rickel v. Atkinson R. & S. F. Ry. Co., — Kan. (1919), 179 Pac. 550, 3 W. C. L. J. 708.

53. Chimora v. International Ice Cream Co., 184 N. Y. S. 500, (1920), 7 W. C. L. J. 96.

54. Indianapolis Light & Heat Co. v. Fitzwater, —Ind. App.—, 121 N. E. 126, 3 W. C. L. J. 284, 18 N. C. C. A. 293, 305; Haskell & Barker Car Co. v. Kay,—Ind. App.—,119 N. E. 811, 2 W. C. L. J. 466, 17 N. C. C. A. 253; Rosedale Cemetery Ass'n. v. Ind. Acc. Comm., — Cal. App. —, 174 Pac. 351, 2 W. C. L. J. 754, 17 N. C. C. A. 389, 688; Wick v. Gunn, — Okla. —, 169 Pac. 1087, 17 N. C. C. A. 254; U. S. Fid. & Guar. Co. v. Indus. Comm., — Cal. —, 163 Pac. 1013, 14 N. C. C. A. 429; Corral v. Wm. H. Hamlyn & Son, — R. I. —, 94 Atl. 877, 14 N. C. C. A. 429.

55. Stewart & Co. v. Howell, — Md. App. —, (1920), 110 Atl. 899, 6 W. C. L. J. 452; Bell v. Stein, — Md. App. —, (1921), 112 Atl. 584.

56. Lupoli v. Atlantic Tubing Co., — R. I. —, (1920), 111 Atl. 766, 7 W. C. L. J. 356.

The burden of proving that a fire was intentionally set rests upon the employer.[57]

The burden of proving inability to work at the employment claimant was engaged in at the time of the injury rests upon the claimant.[58]

An employee suing to set aside an award under the compensation act has the burden of proving that the employer was a "subscriber" within the meaning of the Texas Act.[59]

§ 538. **Judicial Notice.**—The common-law decisions on judicial notice are applied in compensation cases by courts and commissions, though apparently with somewhat greater liberality.

Judicial notice or knowledge has been defined as "the cognizance of certain facts which judges and jurors may, under the rules of legal procedure or otherwise, properly take and act upon because they already know them."[60]

In a Massachusetts case the court said: "The other objection taken by the insurer is that there was no evidence as to what amount an ordinary laborer would have earned and for that reason it was not open to the committee of arbitration and the Industrial Accident Board on review to make a finding that he would have earned $7.50. As was said in Mary Carroll's Case, 225 Mass. 203, 208, 114 N. E. 285, the proceedings before committee and the board of review ought not to be hampered by technicalities. We are of opinion that in determining the amount which can be earned by a day laborer the committee and board had a right to act upon their own knowledge."[61]

The court will take judicial notice of the fact that the duties of a night watchman includes the guarding of the premises from trespassers, thieves, night prowlers and other desperate characters.[62]

57. Milne v. Sanders, — Tenn. —, (1921), 228 S. W. 702.

58. Woodcock v. Dodge Bros., — Mich. —, (1921), 181 N. W. 976.

59. Texas Employer's Ins. Ass'n. v. Pierce, — Tex. Civ. App. —, (1921), 230 S. W. 872.

60. 16 Cyc. 849.

61. In re Walsh, —Mass., 116 N. E. 496. 15 N. C. C. A. 345.

62. Ohio Building Safety Vault Co. v. Indus. Bd., 277 Ill. 96, 115 N. E. 149, 14 N. C. C. A. 224.

The court will take judicial notice of the fact that tips form part of the wages of a taxicab driver.[63] It will also take judicial notice of the infectious nature of disease.[64] A compensation board may take judicial notice of safety rules prescribed by the State Board of Labor.[65]

The court will not take judicial notice that a man engaged as an "ad" man or a "bunk" man in a printing establishment is exposed to the hazards of lead poisoning;[66] nor that a metal road grader has any unusual attraction for lightning;[67] nor of the value of foreign money;[68] nor of rules of the board;[69] nor of the arrival and departure of trains at a particular place.[70]

In a Kansas Case the court said: " Matters of fact of so simple a character are within the common knowledge of jurymen of average intelligence, and the use of a jack to raise the wheel of a heavily loaded vehicle out of a rut or groove is so obviously the proper way to raise it, and so commonly the way it is done, that the jury did not need to be told of it to justify its finding to that effect. There is a clearly defined, though narrow, field of elementary facts of mechanics so notoriously known to every intelligent person that no evidence to establish them before a jury is necessary. Insurance Office v. Woolen-Mill Co. 72 Kan. 41, 46, 82 Pac. 513; Cheek v. Railway Co., 89 Kan. 247, 131 Pac. 617; Cardwell v. Railroad Co., 90 Kan. 707, 136 Pac. 244, 16 Cyc. 852, 15 R. C. L. 1056, 1104; 4 Wigmore on Evidence, Par. 2570. See, also, notes in 31 L. R. A. 489, 37 L. R. A. (N. S.) 790.

63. Sloat v. Rochester Taxicab Co., 177 N. Y. App. Div. 57, 163 N. Y. S. 904, 14 N. C. C. A. 425.

64. McCauley v. Imperial Woolen Co., —Pa.—, 104 Atl. 617, 17 N. C. C. A. 864.

65. Sciolas Case, —Mass.—, 128 N. E. 666, 7 W. C. L. J. 72.

66. In re Doherty, 222 Mass. 98, 109 N. E. 887, 14 N. C. C. A. 427.

67. Wiggins v. Indus. Bd., —Mont.—, 170 Pac. 9, 17 N. C. C. A. 246.

68. In re Derinza.—Mass.—, 118 N. E. 942, 16 N. C. C. A. 210.

69. Hagenback v. Lappert, — Ind. App. —, 117 N. E. 531, 17 N. C. C. A. 247.

70. Stewart & Co. v. Howell, —Md. App.—, 110 Atl. 899, 6 W. C. L. J. 452.

"It has been held that a trial court and jury know, without the introduction of evidence, the purpose of a fender on a street car (Spiking v. Railway & Power Co., 33 Utah, 313, 93 Pac. 838); they likewise know the character, construction, and use of an ice cream freezer (Brown et al. v. Piper, 91 U. S. 37, 23 L. Ed. 200); they also know that the use of dynamite in blasting under a city is inherently dangerous (City of Chicago v. Murdock, 212 Ill. 9, 72 N. E. 46, 103 Am. St. Rep. 221); that vacant buildings are ordinarily more exposed to damage by fire than occupied buildings (White v. Insurance Co., 83 Me. 279, 22 Atl. 167); that it is a matter of common knowledge and needs no proof that the breaking of bridles, harness, and vehicles is of common occurrence, and that when such a mishap transpires it may frighten a gentle horse and cause it to run away (City of Joliet v. Shufeldt, 144 Ill. 403, 413, 32 N. E. 969, 18 L. R. A. 750, 36 Am. St. Rep. 453.)

See, also, the opinion of Judge Van Devanter and the wealth of pertinent citations collected by him in Chicago, M. & St. P. Ry. Co. v. Moore, 166 Fed. 663, 92 C. C. A. 357, 23 L. R. A. (N. S.) 962."[71]

It has been held that it is a matter of common knowledge that sound boards are manufactured from lumber and courts will take judical notice of that fact.[72]

The court will not take judicial notice that an employee engaged in handling molten type may, in the course of his employment, contract lead poisoning.[73]

The appellate courts of Indiana take judicial notice of the population of a city and that the police force of the city was established under the Metropolitan Police Act.[74]

71. Rickel v. Atchison, T. & S. F. Ry. Co., —Kan.—, 179 Pac. 550, 3 W. C. L. J. 708.

72. Oboyle v. Parker Young Co., —Vt.—, (1921), 112 Atl. 385.

73. In re Dougherty, 222 Mass. 98, 109 N. E. 887.

74. Shelmadine v. City of Elkhart, — Ind. App. —, (1921), 129 N. E. 878.

Courts take judicial knowledge of the Workmen's Compensation Act, which dispenses with the necessity of alleging it, so that the mere allegation of a state of facts making the act applicable, will suffice.[75]

75. Steagall v. Sloss Sheffield Steel, and Iron Co., —Ala.— (1920), 87 So. 787.

CHAPTER XV.

NOTICE AND LIMITATION.

Sec.
539. General.
540. When the Time Begins to Run.
541. As Soon as Practicable.
542. Effect of Delay or Failure to Give Notice.
543. Knowledge Obviating Necessity of Notice of Injury.
544. Notice Excused by Special Conditions.
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§ 539. **General.**—The term notice as used in the various compensation acts is confined principally to four phrases—Of election to reject,[76] of injury, of claim and appeal or for review by certiorari. The acts differ widely in the provision as to the time within which these notices are required to be given, and when the failure to give is excused. But they are in accord as to what the notice shall contain. In the case of notice of injury most acts require it to be in writing, but require no special form. Where forms are given in the act it is generally stipulated that no defect or inaccuracy shall affect the sufficiency of the notice provided the employer is not prejudiced by the lack of information therein contained. Some acts contain provisions peculiar to the one state, as in Louisiana, Sec. 14 provides that the employer shall have posted a notice substantially as follows: "In case of accidental injury or death the injured employee or some one acting in his behalf must give notice to (Name and address of party) within fifteen days, and unless notice be given to

76. Section 7 ante. The claimant is not the party to be served with notice of certiorari under the Utah Act. Beck Mining Co. v. Comm., — Utah —, 200 Pac. 111.

the party within fifteen days, no payments will be made under the law for such injury or death." It is further provided that the failure to keep such notice posted extends the time of notice to six months.[77]

Some acts require the written notice of injury to be given "as soon as practicable,"[78] some within 30 days,[79] and in other states the time varies from 10 days to[80] 3 months. The reason for notice is aptly given in a New York case: "One of the requirements is that employees shall notify the employer in the manner provided by the statute as a condition of having the benefits which it confers. * * * A very essential and important purpose of this notice is that the employer may have the benefit of an early investigation of the circumstances surrounding the alleged accident."[81]

§ 540. **When the Time Begins to Run.**—When there is a definite time limit within which notice of injury must be given the acts are not in accord as to when the time limit begins to run. An employee suffered a rupture in June 1916. His foreman and the factory superintendent had knowledge of it. No written notice was given until the 7th day of February, 1917. "In Janurary 1917, because of the aggravated condition of his rupture, he became totally disabled and was obliged to quit work. Under these circumstances it must be held that the real injury did not develop until January 1917. * * * It follows that the proper notice was given 30 days after the injury."[82] In Michigan the decisions are to the contrary. The court in no uncertain terms states:

77. Boyer v. Crescent Paper Box Factory Inc., 143 La. 368, 78 So., 596, 2 W. C. L. J. 71.

78. Kentucky, Massachusetts, Missouri, Nebraska, New Hampshire, Texas, Utah, Section 541 post.

79. California, Colorado, Illinois, Maryland, Maine, Oklahoma, Rhode Island, Tennessee, Wisconsin.

80. Kansas, Maryland, New York.

81. Dorb v. Frederick Stearns & Co. et al. 167 N. Y. Supp. 415, 1 W. C. L. J. 227.

82. Nornbrook-Price Co. v. Stewart, (Ind. App.), 118 N. E. 315, 1 W. C. L. J. 382, 17 N. C. C. A. 81.

"It means, if it means anything, that the time shall begin to run from the day the accident happens and the injury is incurred. To say, that the time does not begin to run until the claimant is fully advised as to the extent of the injuries, as urged, is to import something into the section which is not there."[83]

The wording of the New York act obviates any difficulty on this point as it provides, "notice of an injury * * * shall be given * * * within ten days of disability."[84] The distinction between the words "injury" and "disability" is marked.

A provision of the Alaska Act requiring an employer, who has been furnished with a list of the employee's beneficiaries to notify them in case of the employee's death was held to apply to an employer who with other companies, hired men through a common agent, where the agent was furnished with such statement.[85]

Notice to an employer is, under the Texas Act, notice to the insurer.[86]

Where the act requires notice to the employer to be signed by the injured person or some person in his behalf, a letter from the Industrial Commission, asking why no report of the accident had been made, did not satisfy the statutory requirement, especially so where it furnished blanks to his attorney for the purpose of giving such notice. Notice given to the insurer is not sufficient, since the latter is not the agent of the employer.[87]

§ 541. **As Soon as Practicable.**—When the term as "soon as practicable" is used and no definite time limit is prescribed by

83. Dane v. Michigan United Traction Co., 200 Mich. 612, 166 N. W. 1017, 1 W. C. L. J. 1001; Cooke v. Holland Furnace Co., 200 Mich. 192, 166 N. W. 1013, 1 W. C. L. J. 994, 17 N. C. C. A. 153.

84. In re Gibbons, 181 App. Div. 142, 168 N. Y. Supp. 412, 1 W. C. L. J. 697.

85. Alaska Treadwell Gold Mining Co. v. Crinis, 167 C. C. A. 138 (Alaska).

86. Home Life & Acc. Co. v. Orchard,— Tex. Civ. App.—, (1921), 227 S. W. 705.

87. Dochoff v. Gobe Const. Co., —, Mich. —, (1920), 180 N. W. 414, 7 W. C. L. J. 311.

the act, the phrase when used with reference to the giving of the notice of injury does not mean as soon as possible; the word 'practicable' importing a difference according to the circumstances, and meaning ordinarily that the thing must be done as soon as reasonably can be expected.[88]

In a Massachusetts case the same words were construed with reference to the circumstances of the case. The employee's eye was strained on February 25th, and the seriousness of the injury had not developed until March 17th, when the notice was given. Compensation was awarded.[89] And in another case where two separate accidents occurred upon May 19, 1916, and Dec. 4, 1916, but no report was made of either until May 7, 1917, compensation was denied.[90]

An employee, while lifting a heavy tray of meat onto a truck, felt a pain in his back and did not go to work the next day, but went to his solicitors who wrote to the employer. On September 11th, he told a physician that he had "ricked" his back, not knowing he was ruptured. Just before November 29th, an incipient rupture appeared. The county judge concluded the rupture was due to the accident. It was contended that the employer was prejudiced by not receiving notice until December 4th, because the doctor who first attended the employee had gone to Australia. The court of appeal held that notice was given as soon as practicable. The court said: " I think that there was 'reasonable cause' for the man not giving notice until he was advised of his condition. That being so, it is immaterial to consider whether the employers have been prejudiced in their defense by want of notice."[91]

§ 542. **Effect of Delay or Failure in Giving Notice.**—The effect of delay or failure to give notice is a prejudice to the employer. The extent to which the employer is prejudiced by the

88. Texas Employers Ins. Assn. v. Mummey, (Tex. Civ. App.), 200 S. W. 251, 17 N. C. C. A. 81.

89. Duffy v. Brookline, 226 Mass. 131, 14 N. C. C. A. 651, 115 N. E. 248.

90. Frier's Case, 122 N. E. 195, 232 Mass. 181, 3 W. C. L. J. 638.

91. Walters v. T. Wall & Sons, Ltd., (1918), W. C. & Ins. Rep. 17.

employee's failure to comply with the statutory requirement of notice is a question upon which the courts of the different states are not in accord. In Connecticut it was held "that a total lack of notice by the employee did not raise the inference that there was a total prejudice to the employer, and that the claim was not barred by reason of the lack of notice, but that the evidence should be weighed and the claim barred only to the extent to which the employer was prejudiced by the lack of notice."[92]

As to whether the lack of notice or the delay had been a prejudice to the employer must be decided under the facts peculiar to each case. In an English case a carpenter suffered a small wound upon his wrist. On Dec. 7th he complained of illness, worked a part of Dec. 8th and went home. On Dec. 10th a foreman called with his wages and saw the condition of the arm. No notice was ever given and there was no evidence as to the exact time the wound was received. Blood poisoning set in on the 11th and death ensued on the 19th. Compensation was denied because the employer was prejudiced. In other words the employer, owing to the lack of notice, was deprived of the privilege of securing proper medical attention and further of making any investigation to establish whether the injury was sustained in the course of employment.[93]

It has been held and the rule is settled in New York that where no written notice is given within the statutory period—10 days—the employee has the burden or supplying the evidence and securing a finding that no prejudice has resulted from the failure to give notice.[94] "The legislature, however, has deemed it proper and essential under ordinary circumstances that a written notice should be promptly served so as to give an employer the opportunity to investigate the circumstances of the claim. This requirement ought not to be treated as a mere formality or to be

92. Schmidt v. O. K. Baking Co., 90 Conn. 217, 96 Atl. 963, 14 N. C. C. A. 539, 649; Smith v. Solvay Process Co., — Kan. —, 163 Pac. 645, A 1 W. C. L. J. 663.

93. Jones v. Arnold, 1916 W. C. & Ins. Rep. 513, 14 N. C. C. A. 660.

94. Bloomfield v. November et al., 223 N. Y. 265, 119 N. E. 705, 17 N. C. C. A. 80, 2 W. C. L. J. 347; Andrews v. Butler Mfg. et al., 184 A. D. 698, 172 N. Y. Supp. 405, 3 W. C. L. J. 173.

dispensed with as a matter of course whenever there has been a failure to serve such notice."[95] No award can be made under the New York act in the absence of notice of disability unless the notice could not have been given or the employer had not been prejudiced by the failure to give it. "Notice and consequent chance of investigation is given for the very purpose of enabling the employer to test the good faith of the claimant. Without it no contradiction is possible."[96]

An employee claimed to have been injured on Dec. 13th. The evidence showed an inflamed condition of his finger when he went to work for the employer. "No medical attention was received until Dec. 26th and no notice had been given as required by the statute, or even if knowledge of the alleged injury had been obtained in some other way at or about the time it is claimed the injury occurred, there would have been an opportunity not only for a prompt general investigation of the alleged circumstances of the accident but of the employee's story thereof, and there could have been an examination of the injured finger and such care and attention could have been given it to prevent infection. * * * There can be no reasonable doubt that without the statutory notices or proof of knowledge of the injury and claim, the employer and insurance carrier were prejudiced."[97] Where an employer received notice on the date of the accident, "was in constant touch during the whole of his last sickness, * * * had notice the day he died."[98] it was held that the lack of written notice of the death was in no way prejudicial to the employer or the insurance carrier.

Due notice was not given to the employer where the notice was sent to an assistant foreman, for the foreman was not a person

95. Bloomfield v. November, 219 N. Y. 374, 114 N. E. 805. W. C. L. J. 275.

96. Hynes v. Pullman, 223 N. Y. 342, 119 N. E. 706, 2 W. C. L. J. 351.

97. Combes v. Geibel et al., 226 N. Y. 291, 123 N. E. 452, 4 W. C. L. J. 273.

98. Folts v. Robertson, et al., 188 A. D. 359, 177 N. Y. Supp. 34, 4 W. C. L. J. 429; Frank Martin-Larkin Co. v. Indus. Comm., — Wis. —, (1920), 179, N. W. 740, 7 W. C. L. J. 169.

to whom the statutory notice might be given. Where such a notice had been considered sufficient by the commission the court reversed the award and remitted the matter to the commission for a finding whether the failure of notice had resulted in prejudice to the employer.[99]

The statutory requirement as to notice cannot be nullified by the Commission as a matter of course and without regard to merit.[1]

Where the employee gave no notice and the employer is insured by a private carrier, the question of prejudice should be considered, not as to the employer, but as to the insurance carrier.[2]

An employer is not estopped to plead an employee's failure to make timely claim because of the fact that he furnished medical aid and gave him light work as soon as he was able to do anything.[3]

By the paying of funeral expenses an employer is not estopped to plead want of notice required by the statute as barring right to compensation, if no notice is given and no "payment of compensation" made within two years from the date of the accident.[4]

"In an action under the Kansas Workmen's Compensation Act, the answer was a general denial. On the trial it was shown that no notice of the accident was given to the employer within 10 days as required by section 5916, Gen. Stat. 1915. No instructions were asked with respect to the question of notice, and, the record failed to disclose that the question was called to the attention of the trial court, it is too late to raise the question in the Appellate Court."[5]

99. In re Colon, 184 A. D. 734, 172 N. Y. Supp. 475, 3 W. C. L. J. 180; Indian Creek Coal & Mining Co. v. Beach, — Ind. App. —, 127 N. E. 358, 6 W. C. L. J. 312; Standard Cabinet Co. v. Landgrave, — Ind. App. —, 128 N. E. 358, 6 W. C. L. J. 654; Frank Martin-Larkin Co. v. Indus. Comm., — Wis. —, (1920), 179 N. W. 740, 7 W. C. L. J. 69.

1. Prokopiak v. Buffalo Gas. Co., 176 App. Div. 128, 162 N. Y. S. 288.

2. Sicardi v. Sarnoff Hat Co., 176 App. Div. 13, 162 N. Y. S. 337.

3. Stein v. Packard Motor Car Co., — Mich. —, (1920), 178 N. W. 61, 6 W. C. L. J. 333.

4. Manteufel v. Indus. Comm., — Wis. —, (1920), 179 N. W. 761, 7 W. C. L. J. 173.

5. Vassar v. Swift Co., — Kan. —, 189 Pac. 943, 6 W. C. L. J. 166.

§ 543. **Knowledge Obviating Necessity of Notice of Injury.**— In most of the acts there is a provision that actual knowledge by the employer or his agent is equivalent to a written notice. The meaning of the term "actual knowledge" has been well put in a New Jersey case: "The actual knowledge of the occurrence of any injury required by the Workmen's Compensation Act does not mean the first-hand knowledge of an eyewitness, but what would be called knowledge in common parlance."[6]

In a Massachusetts case[7] the employee strained himself on Oct. 1st. On the 18th he found he was ruptured and after consulting a physician secured a truss and worked at lighter work for three days by arrangement with his foreman. He reported his condition to the timekeeper who took him to another physician. In making a report to the Board the timekeeper stated the injured "ruptured himself about three weeks ago and just began to feel the effects of it the last few days." The report made out by the employer to the board showed the employer to be possessed of actual knowledge.[8] In a Minnesota case the court said: "The statute provides for giving of notice of the injury to the employer unless he has actual knowledge thereof: but, if he had such actual knowledge, the giving of the notice is not necessary."[9] And "where the general foreman had actual knowledge of the injury at the time it was suffered, and the employer's physician was familiar with the case, it was held that the provisions of the statute were satisfied.[10]

Where no notice had been given, and there was sufficient evidence upon which a finding of actual knowledge could have been

6. Allen v. Nillville, 87 N. J. L. 356, 95 Atl. 130, 9 N. C. C. A. 749; Garton v. Kleinknight, — Ind. App. —, (1920), 128 N. E. 770, 7 W. C. L. J. 51; Insana v. Norderholt Corp., 183 N. Y. S. 83, 6 W. C. L. J. 478.

7. In re Brown, 228 Mass. 31, 116 N. E. 897, 17 N. C. C. A. 84.

8. In re Mathewson, 116 N. E. 831, 227 Mass. 470, 17 N. C. C. A. 84.

9. State ex rel. Duluth Diamond Drilling Co. v. Dist. Court of St. Louis County, 129, Minn. 423, 9 N. C. C. A. 1119, 152 N. W. 838; Kraker v. Nett, — Minn. —, (1921), 180 N. W. 1014; Garton v. Kleinknight, 128 N. E. 770, 7 W. C. L. J. 51.

10. Vandalia Coal Co. v. Holtz, (Ind. App.), 120 N. E. 386, 2 W. C. L. J. 880; Swift & Co. v. Ind. Comm. et al., 288 Ill. 132, 123 N. E. 267, 4 W C. L. J. 163.

made, but the Board failed to render such a finding, the decree awarding compensation was reversed and the case recommitted to the Industrial Board for a further hearing on the question of whether the employer had such knowledge as to obviate the necessity of notice.[11]

Where it was argued by the employer that the notice to a foreman was insufficient the court said: "In addition to the notice to the foreman, the fact must be found that the foreman communicated the notice given to him, from the fact that a report of the injury was filed promptly by the subscriber. Thus the knowledge of the subscriber is established."[12]

In Illinois the employer, in prosecuting a writ of error to the Supreme Court, as one of its assignments brought out that no written notice of injury was received, the court said: "The plaintiff in error contends that it did not have notice of an accidental injury within 30 days. * * * The accident happened at the plant of the plaintiff in error, and one of it directors who was within a few feet came instantly, lifted Engelin up partly, helped carry him in the shop, and sent him to the hospital. * * * The plaintiff in error had notice of the accident resulting in Engelin's death at the time, and of the circumstances under which it occurred, and this is all the statute requires; citing Parker-Washington Co. v. Industrial Board, 274 Ill. 498, 113 N. E. 976; Joliet Motor Co. v. Industrial Board, 280 Ill. 148, 117 N. E. 423."[13]

The foreman, "under whom the employee worked, knew of the accident and called a doctor, who amputated Koes' leg and attended him at the hospital. The plaintiff in error knew of the doctor's services and sent him a blank to fill out, and he did so

11. In re Murphy, 226 Mass. 60, 115 N. E. 40, 14 N. C. C. A. 654.

12. In re McLean, 223 Mass. 342, 111 N E. 783, 14 N. C. C. A. 652; Lapan's Case, — Mass. —, (1921), 129 N. E. 607; Bloom's Case, 222 Mass. 434, 111 N. E. 45; Carroll's Case, 225 Mass. 203, 114 N. E. 285; Frank Martin-Laskin Co. v. Indus. Comm., — Wis. —, 179 N. W. 740, 7 W. C. L. J. 169; Walkden's Case, 236 Mass. —, 129 N. E. 396, (1921).

13. Joseph Halstead v. Industrial Comm. et al., 287 Ill. 509, 122 N. E. 822, 4 W. C. L. J. 24.

and returned it. Held, that the employer had notice within 30 days."[14]

While denying the claim on other grounds, on appeal, the court held that a telephone message by the wife of the employee to the employer was sufficient notice.[15]

Where the evidence showed the foreman, who had complete superintendency of the employees in the room, and their work, was informed by the employee of the injury on the day of the accident, the court said: "Oral notice is not the statutory notice and although the employer may obtain from the former, knowledge of the injury, it is not necessarily knowledge within the meaning of the statute. We conclude, however, that the decision contains sufficient to show that the Commission finds the foreman, Penwarden, had reasonable knowledge of the injury."[16]

In a case in which the employer alleged lack of notice of the injury, and it was shown that within the period of notice the employer was represented at the inquest by an attorney and one of its foremen, the court held that the employer had all the notice required by the statute.[17]

It was held that where the evidence tended to show that notice was given within the statutory period, the court could not reverse, even had they thought such evidence was contrary to the weight of the testimony.[18]

And again, notice was rendered unnecessary, where the employee was kicked by a horse and the insurance carrier of the employer paid the medical bill fourteen days after the date of the accident and subsequently paid a dental bill. The court said that, "The employer knew of the accident at the time it occurred, and waived,

14. R. F. Conway v. Industrial Board of Ill., 282 Ill. 313, 118 N. E. 703, 1 W. C. L. J. 752.

15. Peoria Cordage Co. v. Ind. Board, 284 Ill. 90, 119 N. E. 996, 2 W. C. L. J. 451.

16. In re Simmons, 117 Me. 175, 103 Atl. 68, 1 W. C. L. J. 884, 17 N. C. C. A. 86.

17. Sulzberger & Sons, v. Industrial Commission et al., 285 Ill. 223, 120 N. E. 535, 3 W. C. L. J. 33.

18. Hammond Co. v. Ind. Comm., 288 Ill. 262, 123 N. E. 384, 4 W. C. L. J. 176.

by his action in paying the claims of the doctor and dentist, a written notice within 30 days."[19]

In Nebraska there is a provision that lack of written notice shall not bar proceedings if the "employer had notice or knowledge of the injury." No notice of injury or claim for compensation had been made in a case wherein an award was made. In reversing the award the court did so because of lack of claim and not because of the lack of notice. "The defendant's admission, however, that it knew of the injury and death at the time of the occurrence, obviates the necessity of notice."[20]

In California where a foreman was present at the time of the accident and the evidence showed that the employee suffered pain and was unable to fully perform his usual work, which facts were known to the foreman, "The commission was, therefore, justified in concluding that the foreman had knowledge that however slight in degree, some injury had been suffered."[21] And again where the foreman was at the scene of the accident before the body of the deceased was moved and was cognizant of the facts causing the death, the employer was deemed to have actual knowledge of the accident.[22] It has been held that actual knowledge by the bookkeeper is not notice to the employer under the Indiana Act.[23]

In an Indiana case the court said: "Appellee contends that the evidence shows that appellant had sufficient knowledge of appellee's alleged injury and that a reasonable excuse existed for the latter's failure to give the former written notice thereof. If it be admitted that this is true, such fact would not aid appellee, in

19. Bowman v. Industrial Comm. et al., 289 Ill. 126, 124 N. E. 373, 4 W. C. L. J. 701.

20. Good v. City of Omaha, 102 Neb. 654, 168 N. W. 639, 2 W. C. L. J. 871.

21. Frank G. Pryor, Applicant, v. Robert Sherer & Co. et al., 5 Cal. I. A. C. D. 233.

22. Western States Gas & Elec. Co. v. Bayside Lumber Co., — Cal. —, 187 Pac. 735. 5 W. C. L. J. 649.

23. Indian Creek Coal Mining Co. v. Beach, — Ind. App. —, 127 N. E. 850, 6 W. C. L. J. 312.

the absence of a finding to that effect as the award must be sustained if at all by the facts found."[24]

Where an employer had knowledge of an accident but had no knowledge that it resulted in injuries to the workmen, he did not have such knowledge as would dispense with the statutory requirement of giving written notice of an injury.[25]

Notice by a yard conductor to a yard switchman is not notice to the employer.[26]

A subordinate of an overseer in a mill is not a party who may receive notice of an accident for the employer within the statutory provision that knowledge, within the statutory time for giving notice to the employer or his agent, will eliminate the necessity for giving notice.[27]

§ 544. **Notice Excused by Special Conditions.**—Some states have saving clauses which are very liberal as in Kentucky where the failure to give notice is excused when "delay or failure to give notice was occasioned by mistake or other reasonable cause." and where an employee addressed the notice to "Mayfield" instead of "Maysville" the court held, "We are of the opinion that the delay in giving the notice sooner was caused by mistake within the meaning of the statute and that a fair construction of the act did not warrent the rejection by the board of Allen's claim for compensation upon the ground of his delay in giving the notice."[28]

Some acts provide that the failure to give a written notice shall not be a bar to recovery, "if it is found as a fact that there was no intention to mislead the employer and that he was not in fact misled thereby." Under the above wording the com-

24. Standard Cabinet Co. v. Landgrave, — Ind. App. —, 128 N. E. 358, 6 W. C. L. J. 654.

25. Smith v. Indus. Acc. Comm., —Cal.—, 162 Pac. 636, A. 1 W. C. L. J. 199.

26. Herbert v. Lake Shore & M. S. Ry. Co., —Mich.—, 166 N. W. 923, 1 W. C. L. J. 1069.

27. Walkden's Case, — Mass. —, (1921), 129 N. E. 396.

28. Bates & Rogers Const. Co. et al. v. Allen, 183 Ky. 815, 210 S. W. 467, 3 W. C. L. J. 719.

mission found sufficient evidence that the employer knew of the incapacity of the injured and was not misled by the failure to receive a written notice. In affirming the commission's award the court held the burden of proof to be upon the employer to show that he was misled and prejudiced by the lack of notice.[29] But in New York it is held that the burden rests upon a claimant who has failed to give notice of an injury within ten days after disability, as required by the workmen's compensation act, to show that the employer and insurance company have been prejudiced by such failure.[30]

Where the failure to give notice within 30 days is excused, as in Rhode Island, by "accident, mistake or unforeseen cause," by the wording of the act, and it was shown that the injured was very ill, underwent a serious operation and spent a period of convalescence in a distant city from his home and the employer's place of business, it was held that such a combination of events excused the failure to give notice.[31]

In any event the failure to give written notice must be rendered unnecessary by compliance with provisions of the saving clauses. Failure to give notice and the absence of statutory excuse bars the claim.[32]

An employee was injured—suffered a hernia, but did not recognize the nature of his injury. He went home immediately and a few hours later discovered the nature of his injury. His wife called the family physician who recognized the seriousness of the injury and called in consultation a surgeon. The nature of the injury was such that delay would have caused death. He was

29. A. Breslauer Co. v. Industrial Comm. of Wis., 167 Wis. 202, 167 N. W. 256, 2 W. C. L. J. 189, 17 N. C. C. A. 90.

30. Bloomfield v. November et al., 119 N. E. 705, 17 N. C. C. A. 80, 22 N. Y. 265, 2 W. C. L. J. 347; Hynes v. Pullman, 119 N. E. 706, 223 N. Y. 342, 17 N. C. C. A. 83, 2 W. C. L. J. 351.

31. Donahue v. R. A. Sherman's Sons Co., 39 R. I. 373, 98 Atl. 109, 14 N. C. C. A. 148.

32. Herbert v. Lake Shore & M. S. Ry., 200 Mich. 566, 166 N. W. 923, 1 W. C. L. J. 1069; Bushnell v. Industrial Board, 276 Ill. 262, 114 N. E. 496, 14 N. C. C. A. 655; Barrett Co. v. Indus. Comm. et al., 288 Ill. 39, 123 N. E. 29, 4 W. C. L. J. 43.

taken to a hospital and operated upon immediately. The employer opposed an award because of lack of notice. The court, in affirming the award, while recognizing the soundness of the rule requiring notice, "recognize as inferable exceptions in extraordinary cases where the surrounding circumstances and critical condition of the injured party present emergencies or exigencies demanding prompt action which reasonably warrant the injured party in securing the then needed service at the employer's expense without first giving notice and opportunity to furnish or offer the same. * * * When such exception is claimed the question of pressing necessity * * * becomes primarily an issue of fact."[33]

Article 2, Sec. 8, of the Oklahoma Act permits the commission to excuse the lack of notice when there is no prejudice to the employer or "on the ground that notice for some sufficient reason could not have been given," and where the claimant was not aware that his disability was due to the accident until after the period for notice had elapsed, and there was no prejudice to the employer, the failure to make claim was excused.[34]

The Michigan Act provides that in cases of mental incapacity of the employee, claim for compensation must be made within six months after the removal thereof. It is held that this does not apply to the giving of notice of the injury which must conform to the statutory provisions relative to notice.[35]

A mere physical incapacity to personally make out and personally mail or deliver a claim is not such "physical incapacity" as prevents the running of the statute until after the removal of the incapacity.[36]

§ 545. **Limitation—Mandatory.**—Where the time is prescribed in the act within which the claim must be filed and there

33. Gage v. Board of Control of Pontiac State Hospital, 206 Mich. 25, 172 N. W. 536, 4 W. C. L. J. 247.

34. Unity Drilling Co. v. Bentley Okla., 186 Pac. 239, 5 W. C. L. J. 462, (Okla.); In re Geo. A. Smith, 2nd A. R. U. S. C. C. 219.

35. Armstrong v. Oakland Vinegar & Pickle Co., —Mich.—, 163 N. W. 897, A 1 W. C. L. J. 867.

36. Podkastelnea v. Mich. Cent. R. Co., — Mich. —, 164 N. W. 418, A 1 W. C. L. J. 996.

is no qualification, such time limit is mandatory and unless claim is made for compensation within the statutory limit the claim is barred.[38] "The claim in question not having been made and filed within six months from the date of either injury the award must be reversed and set aside."[39] "We consider. and have in substance held, that the statute provision referred to is a limitation affecting not only the remedy, but the right of an injured employee, citing Podkastelnen v. Mich. etc., 164 N. W. 418. * * * The condition of giving notice of a claim for compensation, controlling the right to demand the same is clear."[40]

Where no claim was filed until 2 years and 6 months after the injury was received the court said: "Here is no estoppel. There is no fact falsely asserted, relying upon which the claimant was induced not to file a claim." In this case the employer had made payments for about a year. "Those payments, however, even though stated to be payments under the Compensation Act (Consol. Laws, c. 67), do not help the claimant, for the time to file a claim had passed before they began to be made. They could not have induced claimant not to file a claim. The award should be reversed."[41]

38. Peterson v. Fisher Body Co., 201 Mich. 529, 167 N. W. 987, 17 N. C. C. A. 163; Kaluki v. American Car & Foundry Co., 166 N. W. 1011, 200 Mich. 604, 1 W. C. L. J. 989, 17 N. C. C. A. 162; Haiselden v. Industrial Acc. Board. 275 Ill. 114, 113 N. E. 877, 14 N. C. C. A. 780; Rubin v. Fisher Body Corporation, 205 Mich. 605, 172 N. W. 534, 4 W. C. L. J. 242; Brown v. Weston-Mott Co., 202 Mich. 592, 168 N. W. 437, 2 W. C. L. J. 643, 17 N. C. C. A. 157; Schwartz v. Hartman Furniture & Carpet Co., 205 Ill. App. 330, 17 N. C. C. A. 754.

39. Dane v. Michigan United Traction Co., 200 Mich. 612, 166 N. W. 1017, 17 N. C. C. A. 164, 1 W. C. L. J. 1001; Ohio Oil Co. v. Indus. Comm., —Ill.—, 127 N. E. 744, 6 W. C. L. J. 284; Stein v. Packard Motor Car Co., —Mich.—, 178 N. W. 61, 6 W. C. L. J. 333; Ohio Oil Co. v. Indus. Comm., —Ill.—, 127 N. E. 744, 6 W. C. L. J. 284; Petraska v. National Acme Co., —Vt.—, 1921, 113 Atl. 536.

40. Schild v. Pere Marguette R. Co., 200 Mich. 614, 166 N. W. 1018, 1 W. C. L. J. 1003, 17 N. C. C. A. 155.

41. Degaglio v. Bradley Heating Co., 184 A. D. 243, 171 N. Y. Supp. 679, 2 W. C. L. J. 823; Dochoff v. Globe Const. Co., —Mich.—, (1920), 180 N. W. 414, 7 W. C. L. J. 311.

Where a death claim against a householder, who denied that he was deceased's employer, was not filed within the statutory time for filing claims, and the notice of hearing named the householder's agent as defendant, stating that the claim was against one whom the householder claimed was the employer, and the house-holder was not represented by attorney, but testified under the commissioner's command, he did not waive the statutory bar, and an award against him was subject to reversal as having been rendered without giving him his day in court.[42]

A provision of the statute, which requires that the employer be given notice of an injury, cannot be nullified by any practice of the Industrial Commission.[43]

Where no notice of injury was given and no claim made within the statutory period but the employer admitted knowledge of the injury and death, compensation was allowed by the board, but upon appeal the court said: "We recognize the giving of notice and the making of the claim as distinct and separate prerequisites to the bringing of an action. * * * The employer is entitled to an early demand, so that he may know the nature and amount of the claim; may settle it, if possible, or if not, may investigate the facts and preserve his evidence. * * * The mere fact that the employer has knowledge that the employee had received an injury will not dispense with the necessity of the claimant's making his claim for compensation."[44]

Where an award was made and the record disclosed such knowledge of the accident and injury by the employer as to obviate the necessity of giving a written notice of injury but also disclosed that no claim was made for compensation within the re-

42. Davis v. Butler, — App. Div. —, (1920), 185, N. Y. S. 119, 7 W. C. L. J. 226.

43. Prokopiak v. Buffalo Gas. Co., — N. Y.—, 162 Supp. 288, B 1 W. C. L. J. 1392; Dochoff v. Globe Const. Co., —Mich.—, (1920), 180 N. W. 414, 7 W. C. L. J. 311.

44. Good v. City of Omaha, 102 Neb. 654, 168 N. W. 639, 2 W. C. L. J. 817.

quired statutory period, the court said: " We have recently held that the claim for compensation must be an unequivocal one, citing Boose v. Banner Coal Co., 167 N. W. 954 * * * the award must be vacated."[45]

In a New York case the court in reversing an award said: "It may be that the claimant knew nothing about the procedure under the Workmen's Compensation Law, but his ignorance cannot weaken its provisions and requirements. They are as binding upon him as upon one fully acquainted with all the privileges and obligations of the act. * * * The law states that the right to compensation shall be forever barred unless within one year after the accident a claim for compensation shall be filed with the commission."[46]

Where an employee failed to make a claim within one year, in speaking of the statutory provision requiring the claim to be made within that time, the court said: "This is clearly a jurisdictional fact; without the filing of the claim within one year from the injury the commission is powerless to act, because the right to claim compensation has been forever barred, and even the State Industrial Commission may not revive that claim sufficiently to give it jurisdiction to apply the doctrine of estoppel."[47]

In a California case it was agreed that the formal claim was filed with the commissioner more than six months following the accident, but an application for permanent disability rating was filed less than six months after the accident, and the commission held that the application form filed with the permanent disability rating department was a compliance with the act. One of the commissioners in a dissenting opinion said: "It did not constitute a beginning of proceedings for the collection of compensation and it did not state the nature of any dispute or con-

45. Brown v. Weston-Mott Co. et al., 202 Mich. 592, 168 N. W. 437, 2 W. C. L. J. 643, 17 N. C. C. A. 157.

46. Twonko v. Rome Brass & Copper Co. et al., 224 N. Y. 263, 120 N. E. 638, 3 W. C. L. J. 57, 17 N. C. C. A. 172.

47. O'Esau v. E. W. Bliss, 188 A. D. 385, 177 N. Y. Supp. 203, 4 W. C. L. J. 544.

troversy concerning compensation as provided in section 22. For these reasons it did not amount to an 'application' within the meaning of the act and did not bar the operation of the statute of limitations." The court said that, "With this statement of the law on the subject we fully agree." The award was annulled.[48]

An award was made, though the claim was not presented until after the statutory period. In reversing the award the court held that the provisions of section 24 of the Illinois Act were "mandatory and unless claim was made within 6 months from the time of the injury, the claim was barred."[49]

In a California Case the court said, "The court is unanimously of the view that when the statute speaks of the date of the last payment, it means the date on which the money is actually paid. The proceedings before the commission must be commenced within 6 months thereafter, unless there is some agreement for payments of compensation. Section 16, Industrial Compensation act (St. 1913, p. 287). The award of the commission is annulled."[50]

Where Compensation was granted for injury to a leg, and more than six months later it was sought to change the award to include compensation for injuries to the lungs, the court said: "It was not, we believe, the intention of the law makers to open the statute of limitations and to extend it beyond the period of 6 months for the purpose of enabling a claimant to present an entirely new case based upon the alleged results of an injury which had never before been called to the attention of the commissioners."[51]

48. Fidelity & Casualty Co. of N. Y. et al. v. Ind. Acc. Comm. of State of California et al., 177 Cal. 472, 170 Pac. 1112, 17 N. C. C. A. 158, 1 W. C. L. J. 731.

49. Bushnell v. Industrial Board of Ill., 276 Ill. 262, 114 N. E. 496, 14 N. C. C. A. 772; Smith v. Solway Process Co., 100 Kan. 40, 163 Pac. 645, A 1 W. C. L. J. 663; Central Locomotive and Car Works v. Indus. Comm., — Ill. —, 125 N. E. 369, 6 W. C. L. J. 367; Ohio Oil Co. v. Indus. Comm., —Ill.—, (1920), 127 N. E. 744, 6 W. C. L. J. 284.

50. Miller v. Ind. Acc. Comm. of Cal., 172 Cal. 473, 156 Pac. 1033, 14 N. C. C. A. 772.

51. Ehrhardt v. Ind. Acc. Com. of Cal., 172 Cal. 621, 158 Pac. 193, 14 N. C. C. A. 772.

The statute of limitations must be pleaded, as such statute is a defense to the proceedings and failure to plead waives it. Raising of the point on rehearing for the first time is not permitted.[52]

The limitation on filing a petition in New Jersey is avoided if the parties have agreed upon the compensation payable under the act. (Sec. 23). The court in one case said: "It is sufficient if the contract may be implied from the acts of the parties, or from what they have said to each other, or otherwise from the facts. It would seem to be sufficient for an employer to say that 'I will pay you whatever is due you under the act,' where the other party acquiesces in the promise, and changes his position in reliance on it."[53]

In March, 1914, an employee injured his ankle. The injury developed slowly and in June he went to a hospital. Claim for compensation was made 8 months after the injury. An award was made. In reversing the award the court held that his incapacity or his ignorance of the English language did not excuse the making of the claim within 6 months.[54]

Payment of hospital or medical bills cannot be considered as compensation and thus extend the time for giving notice, where the act grants a year after the last payment of compensation.[55] The payment of funeral expenses is not the payment of compensation due to a dependent and does not therefore estop the employer from claiming the benefit of the statute requiring a notice to be given by the dependent.[56] Nor are voluntary payments not purporting to be made in compliance with the provisions of the

52. Red River Lumber Co. v. Pillsbury, 174 Cal. 34, 161 Pac. 982, 14 N. C. C. A. 786; United States Fidelity & Guaranty Co. v. Pillsbury, 174 Cal. 198, 162 Pac. 639, 14 N. C. C. A. 786, A 1 W. C. L. J. 203.

53. Wright v. Smith, 38 N. J. L. J. 231 (Essex Common Pleas, 1915).

54. Podkastelnea v. Michigan Cent. R. Co., 198 Mich. 321, 164 N. W. 418, 17 N. C. C. A. 166.

55. Paolis v. Tower Hill Connellsville Coke Co., 265 Pa. 291, 108 Atl. 638, 5 W. C. L. J. 466.

56. Mantenfel v. Industrial Comm., —Wis.—, 179 N. W. 761, 7 W. C. L. J. 173.

act, sufficient to obviate the necessity of a claim within the statutory period.[57]

An injury was suffered in 1915, for which no claim was made and the injury was claimed to have been aggravated by one occurring in 1918, which resulted in death some four months following the second accident. No notice of the second accident having been given, and claim being barred by limitation on the first accident, the award was reversed.[58]

In a California case formal claim was not made until about 9 months after the accident. The court held that, the fact that he had worked for a period of some months following the accident did not raise the question that he had received compensation, and thus extend the time for making claim, as the pay he received was the normal wage. Nor could he rely upon statements of unauthorized employees, to the effect that the claim was sent in and compensation would be paid.[59]

In Illinois where some payments were made by the employer's insurance carrier, which payments ceased owing to the insolvency of the carrier, the employer refused to continue the payments, alleging that no claim was made within six months following last payment by the carrier. The notice was held to have been in time as it was made within six month after the receipt and cashing of the last draft, although the receipt accompanying the draft was dated a few days before its payment. The court said: "The receipt of a check is not payment of a debt until such check is honored, unless accepted as such. Brown v. Leckis 43 Ill. 497; Angus v. Chicago Trust & Savings Bank, 170 Ill. 298, 48 N. E. 946. While the receipt signed by Mrs. West was dated February 10, 1917, it was apparent that it was dated in the office

57. Ohio Oil Co. v. Indus. Comm., —Ill.—, (1920), 127 N. E. 774, 6 W. C. L. J. 284.

58. Wright v. Brooklyn Union Gas Co., 190 A. D. 824, 180 N. Y. S. 715, 5 W. C. L. J. 736.

59 Hunt v. Ind. Acc. Comm., —Cal. App.—, 185 Pac. 215, 5 W. C. L. J. 141.

of the casualty company before it was sent to her, and does not therefore show the actual date of the receipt of payment by her."[60]

A claim for permanent partial disability after the termination of total disability is barred where it is not made within the statutory time for makng cliams, and this limitation applies to an application for modified compensation applicable to prior injuries.[61]

§ 546. **Sufficiency of Claim.**—In Illinois where the evidence shows that the employee made orally an affirmative claim for compensation within the statutory period it is sufficient.[62]

The court said, "This section (24) of the statute, however, does provide later that if payments have been made under the provisions of the act, then a 'written' claim must be made within six months after such payments cease."[63]

But any oral claim must be affirmative and unequivocal, and where the statement was to the effect, if the employee did not get better he would have to make a claim, the court said, "We think this is not in compliance with the act."[64]

In a Kansas case the court said: "The claim is not required to be in writing. An oral demand is sufficient under the language of the statute."[65] The foregoing statement follows the holding in other Kansas cases.[66]

60. Stephens Engineering Co. v. Ind. Comm. et al., 290 Ill. 88, 124 N. E. 869, 5 W. C. L. J. 205.

61. In re Hogan,—Ind. App.—, (1921), 129 N. E. 633.

62. Suburban Ice Co. v. Industrial Bd., 274 Ill. 630, 113 N. E. 979, 14 N. C. C. A. 777; Moustgaard v. Ind. Comm. et al., 287 Ill. 156, 122 N. E. 49, 3 W. C. L. J. 600; Heed v. Ind. Comm., 287 Ill. 505, 122 N. E. 801. 4 W. C. L. J. 27; Joliet Motor Co. v. Ind. Bd. et al., 280 Ill. 148, 117 N. E. 423, 15 N. C. C. A. 75, 1 W. C. L. J. 30; R. F. Conway v. Ind. Bd. et al., 282 Ill. 313, 118 N. E. 705, 1 W. C. L. J. 752, 17 N. C. C. A. 88.

63. Suburban Ice Co. v. Ind. Board of Ill., 274 Ill. 630, 113 N. E. 979, 14 N. C. C. A. 777.

64. Baase v. Barney Coal et al., 202 Mich. 59, 167 N. W. 954, 2 W. C. L. J. 287, 17 N. C. C. A. 160.

65. Sillix v. Armour & Co., 99 Kan. 103, 14 N. C. C. A. 778, 130 Pac. 1021.

66. Halverhout v. Southwestern Milling Co., 97 Kan. 484, 155 Pac. 916; Gailey v. Peet Bros, Mfg, Co., 98 Kan. 53, 14 N. C. C. A. 779, 157

The court in passing upon the sufficiency of a claim sent by letter said: "Any claim made within the time limited, ought to be considered sufficient if it fairly gives the employer such information as the law intends."[67] Service by a constable of the claim within the statutory period is good service.[68] And where claim was made orally, by claimant's attorney, to one of two co-partners, who were doing business under two partnership names; the statement being made that the claim was made against both of them, and the two partnerships or in whatever name they were doing business, it was held that the claim was sufficient.[69]

In Kansas the filing of an action for damages setting forth the details of the accident was held to be notice that recovery was sought and sufficient notice of a claim for compensation.[70]

If the claim is made within six months and the employer notified, it is not necessary for such claim to be presented to the employer before presenting it to the Industrial Commission.[71]

In a Massachusetts case the claim was filed by the claimant's attorney. The court in holding the claim to be sufficient said: * * * "it complies with all the requirements of the statute. It states the time, place, cause and nature of the injury; it is signed on behalf of the dependents by the attorney who represented them at the hearing; and it was filed within six months after the death of the employee."[72]

The sufficiency of the notice was questioned by the employer, and it was held that a letter written on November 6th by the

Pac. 431; Knoll v. City of Salina, 98 Kan. 428, 14 N. C. C. A. 779, 157 Pac. 1167.

67. Shafer v. Parke, Davis & Co., 192 Mich. 577, 159 N. W. 304, 14 N. C. C. A. 776.

68. Victor Chemical Works v. Indus. Bd., 274 Ill. 11, 113 N. E. 143, 14 N. C. C. A. 777.

69. Victor Chemical Works v. Industrial Bd. of Ill., 113 N. E. 143, 274 Ill. 11, 14 N. C. C. A. 777.

70. Heinze et al. v. Industrial Comm. et al., 288 Ill. 342, 123 N. E. 598, 4 W. C. L. J. 361; Ackerson v. National Zinc Co., 96 Kan. 781, 153 Pac. 530, 14 N. C. C. A. 775.

71. Mississippi River Power Co. v. Indus. Comm., 289 Ill. 353, 124 N. E. 552, 5 W. C. L. J. 50.

72. In re Pagnoni, 230 Mass. 9, 118 N. E. 948, 1 W. C. L. J. 806, 17 N. C. C. A. 158.

general attorney of the employer acknowledging the receipt of the notice of claim for an accident on October 2nd, and by reason of the fact that the employer had the notice and produced it at the hearing it was positively proved that the employer was notified.[73]

Where an employee asked the employer's physician whether he would receive pay for his time, and received an answer, 'that he would not,' he could not be said to have made a claim upon the employer for compensation.[74]

In an action in the Circuit Court for the death of an employee, plaintiffs must allege that the claim for compensation was made within 6 months after the death of the employee. And such action for the death of the employee is not maintainable unless the claim for compensation is first prosecuted to a decision before the Industrial Commission. This prerequisite to instituting a suit is not waived by a statement by the insurer's attorneys that the insurer was investigating the claim and would advise plaintiffs as to its decision upon completion of the investigation.[75]

"The Industrial Commission under the Wisconsin Workmen's Compensation Act is an administrative body, and not a court. It has no power as such body other than those granted it by the statutes of its creation, and it has no power of certifying or sending proceedings brought before it to any court or other tribunal.

"The proceedings therefore brought before it cannot be held to be the situation contemplated by section 2836b, under which, when it appears to a court that a party claiming affirmative relief or damages has mistaken his remedy, his proceeding or action shall not be finally dismissed or quashed, but he shall be allowed a reasonable time within which to amend, or, in case the court has no jurisdiction to grant the relief sought, then the action, or a divisible part thereof, may be certified to some other court which has jurisdiction. Its application is illustrated in such cases

73. Jackson v. Ind. Board of Ill., 280 Ill. 526, 117 N. E. 705, 17 N. C. C. A. 157.

74. Stein v. Packard Motor Car Co.,—Mich—, (1920), 178 N. W. 61, 6 W. C. L. J. 333.

75. Georgia Casualty Co. v. Ward, — Tex. Civ. App —, (1920), 220 S. W. 380, 6 W. C. L. J. 108.

as Cronin v. Janesville, 163 Wis. 436, 158 N. W. 254, Komorowski v. Jackowski, 164 Wis. 254, 159 N. W. 912, or of Dring v. Mainwaring, 168 Wis. 139, 169 N. W. 301, where proceedings in one court were permitted to be changed in form and substance or certified to another court which may more properly assume jurisdiction, but it cannot avail the plaintiff here.

"By parity of reasoning neither can the dismissal of the proceedings before the Industrial Commission in March, 1917 be considered in substance or effect as analogous to such a nonsuit in a court of proper jurisdiction after which a second suit for the same cause of action may be instituted and the first cause be considered as a substantial compliance with the Statute, Sec. 4222 (5) quoted above as was held in the cases of Odegard v. North Wis. L. Co., 130 Wis. 659, 110 N. W. 809, or in Wawrzyniakowski v. H. & B. Mfg. Co., 146 Wis. 153, 158, 131 N. W. 429.

"Plaintiff having failed to comply with the provisions of section 4222 (5), he lost the right of action asserted in this case, and the court below properly directed judgment for the defendant."[76]

Where notice of the injury was given within the proper time and the employee was acting under the advice of the attending physician, it is immaterial that the operation for his hernia was deferred for over a year and he is entitled to compensation for the period of disability resulting therefrom.[77]

Where the form of a claim, which was presented within one year after the happening of an accident, was defective, in that it permitted no determination of dependency, it was held that there was no claim made within the specified time of one year for filing claims.[78]

Where the employer had notice of the injury and paid the medical and hospital bills upon presentation, having full knowledge of the facts relative to the case, it must be deemed that this was a sufficient compliance with the statutory requirements of making a claim.[79]

76. Brunette v. Brunette, — Wis. —, (1920), 177 N. W. 593, 6 W. C. L. J. 236.

77. In re Hines, Wm. F., 3rd A. R U. S. C. C. 98

78. In re John Ljungren, 3rd A. R. U. S. C. C. 100.

79. In re David Shaw, 3rd A. R. U. S. C. C. 98. But see to the

It has been held in California that in a proceeding for compensation by a wife who has been deserted by her husband, constructive notice by publication is sufficient as to the husband, for the proceedings may be characterized as one quasi in rem.[80]

In the same case it was held that, where the wife, who had been deserted by her husband, instituted proceedings in her husbands name, signing the application herself, and after the six month period for filing claim had elapsed, amended the application so as to proceed in her own name, there was a sufficient claim within the time limit, since the amendment was a correction and not the commencement of a new proceeding.[81]

It has been held under the Main Act that a claim for compensation must be made within a year, it need not be in writing and is sufficient if the employer is apprised that compensation is claimed. Notice of claim may be waived, and is waived where the employer immediately offers to take charge of the proceedings and expenses of enforcing the claim for compensation. A prior adjudication in another state, not on the merits, will not preclude a proceeding to enforce the claim if it is filed in time.[82]

It has been held under the New Jersey Act that where a petition and order for a hearing were served by the sheriff his return did not constitute a filing of the papers. But a petition presented to the judge, in the clerk's absence, who made an order reciting its filing and fixing a time for hearing, and which was served the same day, constiutes a sufficient filing within the time limit.[83]

"Where a petition was filed under the New Jersey Workmen's Compensation Act (Act April 4, 1911 (P. L. p. 134), and a day was thereafter fixed for hearing by the court, and the hearing was continued by an order regularly entered until June, 1914,

Contrary Petraska v. National Acme Co., — Vt. —, (1921), 113 Atl. 536.

80. Northwestern Redwood Co., v. Indus. Comm., — Cal. —, 194 Pac. 31, 7 W. C. L. J. 262.

81. Northwestern Redwood Co. v. Indus. Comm. of Cal., — Cal. —, 194 Pac. 31, 7 W. C. L. J. 262.

82. Smith v. Heine Boiler Co., — Me. —, (1921), 112 Atl. 516.

83. Cooney v. Rushmore, — N. J. —, 100 Atl. 692, B. 1 W. C. L. J. 1144.

and nothing further was done thereafter until September 25, 1915, involving a period of over 12 months, when an order was made fixing a day for hearing, it was held that the proceedings under the act are intended to be of a summary nature, and the failure of the petitioner to move the hearing during the interim warranted the defendant in concluding that the proceeding had been abandoned, and the order, fixing a day under the circumstances, is set aside."[84]

The statute of limitations begins to run under the Pennsylvania Act, from the last payment of compensation, and a claim must be filed within one year from the date of the last payment;[85] but there is no limitation of time on the right of review.[86]

The period of compensation for total disability is not fixed so as to require a new application for such disability, which recurred when the employee returned to work apparently recovered, to be begun within one year, under the statute requiring proceedings to be begun one year from the termination of the compensation period fixed by the award.[87]

§ 547. **Delay Excused by Statutory Provisions.**—In Massachusetts the time for filing a claim is not mandatory. In other words, the act provides certain conditions excusing the filing of a claim within a stated period. The evidence must be conclusive that the failure to file the claim was bona fide. The Massachusetts act provides that a failure to present a claim in writing shall not be a bar if such failure shall be due to "mistake or other reasonable cause." Under that provision an effort was made to excuse the failure to file a claim by dependents residing in a foreign country, within the statutory period. The court said, "Neither ignorance of the law nor simple absence from the country constitute reasonable cause for failure to make the claim seasonably."[88] In the

84. Ringwalt Linoleum Works v. Liquor, — N. J. —, 99 Atl. 124; B. 1 W. C. L. J. 1169.

85. Chase v. Emery Mfg. Co., —Pa.—, (1921), 113 Atl. 840.

86. Id.

87. Fort Branch Coal Co. v. Farley, —Ind. App.—, (1921), 131 N. E. 228.

88. In re Gorski, 227 Mass. 456, 116 N. E. 811, 14 N. C. C. A. 781.

above case there were no conditions preventing communication, and hence no reason which prevented the claim from being presented. The rule is settled in Massachusetts.[89]

In West Virginia a brother of the deceased filed a claim for the nonresident dependents and when this application was refused, through an attorney he exerted every effort to comply with the requirements of the statute, but the signed claim did not reach the attorney and was not filed until twelve days after the period for filing had elapsed. The court found that as there was no express wording requiring the claim to be made in writing and signed by the claimants, and that the claim, "ought not to be defeated by a strict adherence to rules of procedure not expressed in the statute * * * the claim here was pressed consistently during the whole of that period." The court accordingly held the claim properly made.[90]

Where the injury seems slight, and for that reason no claim is made but the injury results in serious disability later, "it well may be found that failure to make a claim within 6 months of the injury was occasioned by mistake. * * * Under these circumstances as matter of construction of the act the claim must be filed within a reasonable time after the mistake is discovered, and in deciding what is a reasonable time, all the circumstances of the case including the rights to the insurer as well as the rights of the petitioner must be taken in account."[91]

A fall, suffered by a carpenter, injured his back. On October 2, 1916, he learned definitely that he had lost the use of his legs. Claim was not presented until October 30th 1916, and the court held the claim not to have been presented within a reasonable time.[92]

In a Kansas case where the actual injury to an eye did not develop until three months after the accident it was held that the

89. In re Flerro's Case, 111 N. E. 957, 223 Mass. 378 14 N. C. C. A. 782; In re McLean, 223 Mass. 342, 111 N. E. 783, 14 N. C. C. A. 784; In re Fells, 226 Mass. 380, 115 N. E. 430, 14 N. C. C. A. 784.

90. Culurides v. Ott, 78 W. Va. 696, 90 S. E. 270, 14 N. C. C. A. 780.

91. In re Carroll, 225 Mass. 203, 114 N. E. 285, 14 N. C. C. A. 782.

92. In re Levangie, 228 Mass. 213, 117 N. E. 200, 17 N. C. C. A. 163.

failure to make the claim within the statutory period barred the claim.[93]

Where there is the saving clause, "in the event of his physical or mental incapacity within six months after * * * removal of such physical or mental incapacity," it has been construed that such incapacity during the period, whether it immediately follows the accident or not, shall have the effect of excluding such period from the effect of the statutory limitation.[94]

By many of the acts a minor is deemed sui juris.[95] In Iowa a minor may make an agreement as to compensation but the money must be paid to a trustee.[96] Most of the acts provide that no limitation of time shall run against minor dependents so long as no guardian or next friend has been appointed.[97]

Where the accident occurred on August 10th, 1916, and the notice of claim was served on January 15, 1917, signed by the next friend and his mother, as no guardian had been appointed, the provisions of the statute were met and the action not barred.[98]

Where it appeared that both parties had entered into an agreement with reference to compensation under the act, the court said that, "such action constitutes a waiver on the part of the employer of the statutory requirement that the employee shall file his claim within six months from the date of injury."[99]

In the above case an agreement had been made, compensation paid and the case closed. Further disability developed, and the employee filed an action to reopen the case and allow further compensation. During the pendency of this action the employee died. An award was made covering the time from the date on which last payment had been made to the date of death. Twenty

93. Smith v. Solway Process Co., 100 Kan. 40, 163 Pac. 645, 14 N. C. C. A. 782.

94. Simon v. Cathroe Co., 101 Nebr. 211, 162 N. W. 633, 14 N. C. C. A. 771.

95. Missouri, Nebraska.

96. Sec. 2477m-13, Iowa Comp. Law.

97. Kentucky, Oklahoma, Kansas.

98. Minturn v. Proctor & Gamble Mfg. Co., 102 Kan. 885, 172 Pac. 17, 17 N. C. C. A. 171, 2 W. C. L. J. 57.

99. Curtis v. Slater Const. Co., 160 N. W. 659, 191 Mich. 259, 14 N. C. C. A. 785.

two months after his death the widow filed a claim, which was awarded by the board, but reversed by the court, because of her failure to file claim within six months, "not being a party in interest to the proceeding of her husband during his lifetime, plaintiff's subsequent claim * * * was not beneficially or detrimentally affected through anything done by him."[1]

In Illinois the act provides that where the employee has returned to the employment of the employer in whose service he was injured he shall not be barred from asserting a claim provided notice of the claim is filed with the Industrial Board within eighteen months after the employee returns. This has been construed to be an exception to the general provision that notice must be given within six months. An employee was injured on August 11, 1913, returned to work on March 15, 1914, and after working six weeks was discharged. Compensation was paid the employee up to March 15, 1914. He had not fully recovered at the time of returning to work or at the time of his discharge. Claim was made for compensation on July 23rd, 1915. The court in affirming an award said: "While it is true an employee may return to his employment under paragraph (d) for a period of a few days or a few weeks and thereby gain the advantage of additional time in which to file his claim, yet such is the plain provision of the act, and such act lies within the power of the legislature to pass." The court in the same case said, "the employee who does not return to his former service within a period of 6 months after the injury or after the cessation of payments and who does not within said period or periods make claim for compensation, can claim no benefit under paragraph (d) as he has by such failure to make claim for compensation waived all rights thereto."[2]

In another case where the employee had returned to work after the accident and subsequently died, the court said: "Giving to paragraph (d) a reasonable construction in the light of the other

1. Curtis v. Slater Const. Co., 202 Mich. 673, 168 N. W. 958, 2 W. C. L. J. 909.

2. Otis Elevator Co. v. Indus. Comm., (Ill.), 123 N. E. 600, 4 W. C. L. J. 364.

provisions of the act, we think that the legislature intended that if the injured employee should return to work and should thereafter die, his beneficiaries could not be prevented from asserting a claim for compensation if they filed a claim within eighteen months after the injured person returned to such employment. This construction is surely in accord with the spirit and purpose of the entire act."[3]

Where a claim is made by the dependent under the compensation act, the administrator's right to sue is lost in Michigan as part VI, Sec. 1, provides that the filing of such claim, "shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury."[4]

It has been held in a Texas case that where an employee has been assured by agents or representatives of the insurer that no proceedings would be necessary, he was entitled to rely upon such representations and the delay in presenting his claim was excusable.[5]

§ 548. **Date of Filing.**—The requirement that a claim must be filed has been held to mean that it must be actually in the possession of the board. A West Virginia case presents the question well: "Neither the date of mailing or posting of such application nor the date when by due course it should have reached the compensation commissioner can be treated as the date of filing of such application in order to bring it within the provision of the statute, although such delay may have been due to the existence of a state of war not between the United States and the country in which application was posted, the statute not in terms suspending the operation of the statute of limitations in such cases."[6] And also a Massachusetts case, where the employee claimed to

3. Bowman v. Industrial Comm., (Ill.), 124 N. E. 373, 4 W. C. L. J. 701.

4. Gray v. Brown & Sehler Co., 200 Mich. 177, 166 N. W. 930, 17 N. C. C. A. 171.

5. Home Life & Acc. Co. v. Orchard,—Tex. Civ. App.—, (1921), 227 S. W. 705.

6. Poccardi, Royal Consul of Italy v. Ott, — W. Va.—, 98 S. E. 69, 3 W. C. L. J. 547.

have mailed a claim for compensation but the board had never received it, the court said: "The word 'filed' in this connection imports that the claim is to be placed permanently on the files of the board, so that any person interested may refer to it. The paper on which the claim, with the details set forth in the statute, is written actually must be delivered physically into the possession of the board before it can be said to be filed with the board."[7]

The compensation petition must actually be filed in New Jersey, within one year. It is not filed if presented to the court and the order made, within one year, for filing.[8]

Under the General Construction Law, "the day from which any specified period of time is reckoned shall be excluded in making the reckoning," and in accordance therewith it has been held that where the accident happened on January 10, 1916, and the filing of the claim was on January 10, 1917, it was filed with the commission in time.[9]

The time for filing dates from the time of the injury and a widow's claim was barred where she reckoned time from the date upon which her deceased husband had temporarily returned to work instead of the date of the injury. The court said: "The notice within 30 days and the claim for compensation within 6 months are jurisdictional, and an award cannot be sustained, in the absence of evidence of a compliance with these requirements of the statute. Haiselden v. Industrial Board, 275 Ill. 114, 113 N. E. 877; Bushnell v. Industrial Board, 276 Ill. 262, 114 N. E. 496. On June 25, 1918, Mrs. Brown served upon the company a written claim for compensation. This was within 6 months after the last of the weekly payments made to Brown by the company, and defendant in error claims that these payments were made under the provisions of the act, and she is therefore entitled to maintain this proceeding under the last clause of section 24. From the evidence in regard to these payments, which has already been set forth, it is manifest that they were not made under the provisions

7. In re Gorski, 116 N. E. 811, 14 N. C. C. A. 776, 227 Mass. 456.

8. Hendrickson v. Public Service Ry. Co., 87 N. J. L. 366, 94 Atl. 402.

9. Hudspith v. Pierce-Arrow Motor, 180 N. Y. App. Div. 147, 167 N. Y. Supp. 418, 1 W. C. L. J. 230, 17 N. C. C. A. 155.

of the act, but were voluntarily made without reference to those provisions; the plaintiff in error denying its liability and the administratrix and her attorney knowing that it denied all liability

"The case is different from that of Tribune Co. v. Industrial Com., 290 Ill. 402, 125 N. E. 351. In that case, as in this case, no claim for compensation was made within 6 months of the accident, though within that time payments of compensation were made, while none were made in this case. In that case a contract of settlement was made, which was approved by the Industrial Commission under the Workmen's Compensation Act. The agreement of settlement recited that jurisdiction had been lost under the Workmen's Compensation Act, and that the settlement was purely voluntary on the part of the employer, but it was held, following Wabash Railway Co. v. Industrial Com., 286 Ill. 194, 121 N. E. 569, that any settlement or agreement made between an employer operating under the act and an injured employee must be considered as having been made under the act, and is a submission to the jurisdiction of the Industrial Commission, and a waiver as to any question of time limitation then existing, even though the agreement stated to the contrary.

"The claim is made that under this provision Brown and his administratrix were entitled to file a claim for compensation at any time within 18 months after August 13, 1917, the date when Brown returned to work after his absence at the hospital. That provision does not apply to this case. Its intention is to extend, for 18 months after his return to work, the right of an employee to maintain an existing claim, and not to grant a right. If an employee who has been injured and has a right to compensation returns to work for the same employer, the law gives him 18 months in which to file his claim with the Industrial Commission, but does not create in him a new right, which he did not have at the time he returned."[10]

10. Ohio Oil Co. v. Indus. Comm., — Ill. —, (1920), 127 N. E. 744, 6 W. C. L. J. 284; Black Diamond Collieries v. Deal, — Tenn. —, 234 S. W. 322.

CHAPTER XVI.

ADMINISTRATION, POWER AND PROCEDURE.

SEC.
549. General.
550. Procedure.
551. Pleading.
552. Proceedings to Increase, Diminish or Terminate Compensation.
553. Rehearing.
554. Findings.
555. Powers of Commission or Board.

§ 549. **General.**—Compensation acts may be divided into two general classes in regard to administration and procedure, namely; the commission or board form, and the court form. By far the larger number of states have adopted the commission form. A commission or board is created, consisting of from three to five members as in Kentucky, Illinois, Missouri and Oklahoma and many other states.[11] Iowa and Nebraska and a few other states have one commissioner.[12] The functions and powers of the commission are extensive and include the receipt of notices of acceptance or rejection of the act,[13] notices of accident and claim for compensation,[14] settlement of disputes and approval of agreements of the parties, granting of awards, and other powers including the formulation of reasonable rules of procedure.

Under the court form of act, the parties settle the terms of compensation unless an agreement cannot be reached, in which event they refer the claim directly to the court or an arbitration

11. California, Connecticut, Indiana, Maine, Maryland, Massachusetts, Michigan, Montana, Missouri, New York, Ohio, Oregon, Texas, Washington and Wisconsin.

12. South Dakota, Vermont, and West Virginia.

13. Section 7, Chapter II.

14. Chapter XV.

committee selected by the court, the parties, or both, as in Kansas. Under the court form in many of the states the supervision of certain phases of the administration is intrusted to other state offices or officers.[15] In Tennessee the duties of administration are divided between the Insurance Commissioner.[16] Bureau of Workshop and Factory Inspection,[17] and the courts.[18] The procedure before the state or common law courts under the form of act is slightly modified, being of a more summary nature than the procedure followed in the ordinary action in those courts. While the fundamental and elementary principles of judicial inquiry should be observed,[19] the procedure before the commission or board should be flexible and informal to the extent of accomplishing the aim of the acts in summary manner and yet preserve the rights of the parties and do justice in accordance with the terms of the acts.[20]

In a Massachusetts case the court said: "The Industrial Accident Board is not a court of general or limited law jurisdiction; * * * it is purely and solely an administrative tribunal, specially created to administer the Workmen's Compensation Act in aid and with the assistance of the superior court."[21]

Thus in Illinois the court said that, "The arbitrator, committee of arbitration and Industrial Board are administrative bodies and have no judicial functions."[22] And in Michigan; "The board was treated purely as an administrative agency to carry the provisions of the act into effect. The act being elective, it is operative only as to those who choose to come within its provisions, and in that particular it is a board of arbitration by agreement, but, aside from that consideration, it is but an

15. New Hampshire, Arizona, Alaska, Rhode Island, Wyoming.

16. Sections 41, 42, 43, 46.

17. Sections 31, 35.

18. Sections 32, 33, 34.

19. Reck v. Whittlesberger, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771; Kelley's Dependents, v. Hoosac Lbr. Co., —Vt.—, (1921), 113 Atl. 818.

20. In re Hunnewell, 220 Mass. 351, 107 N. E. 934.

21. In re Levangie, 228 Mass. 213, 117 N. E. 200, 16 N. C. C. A. 744.

22. Savoy Hotel Co. v. Industrial Board of Ill., 279 Ill. 329, 116 N. E. 712, 16 N. C. C. A. 746.

administrative body, vested it is true with various and important powers, some of them quasi-judicial in their nature."[23] And in Indiana: "We do not hold that the Industrial Board is more than an administrative body, which in the course of its administration of the law is empowered to ascertain some questions of fact and apply the existing law thereto, and in so doing acts quasi-judicially."[24]

In a Wisconsin case it was held that the Industrial Commission not being a court, in the absence of statutory requirement a minor did not require a guardian to institute proceedings.[25]

But under the California Act a minor must be represented by a guardian in all proceedings before the Industrial Commission, otherwise he may dissaffirm his action upon attaining his majority. A female does not reach her majority until 21 years of age for purposes within the compensation act.[26]

§ 550. **Procedure.**—To facilitate the early adjustment of compensation claims, most acts permit the employer and employee to agree upon the compensation and to pay and accept it as provided in the act and warranted by the facts of the particular case. In several of the states this agreement must be approved by the Commission, Board or Bureau,[27] court,[28] or judge.[29] Under some acts the terms of compensation may be settled by agreement at any time after the injury.[30] The commissioner must approve such agreement in South Dakota, Vermont, Iowa and Connecticut, the department of labor in New Jersey, and in Nebraska it is provided that the agreement shall be filed

23. Mackin v. Detroit Timkin Axle Co., 187 Mich. 8, 153 N. W. 49, 16 N. C. C. A. 745.

24. In re Stone, 64 Ind. App. —, 117 N. E. 669, 1 W. C. L. J. 181, 16 N. C. C. A. 746.

25. Menominee Bay Shore Lumber Co. v. Indus. Commission of Wis., 162 Wis. 344, 156 N. W. 151, 16 N. C. C. A. 746.

26. Gouanillou v. Indus. Acc. Comm., — Cal. —, (1920), 193 Pac. 937, 7 W. C. L. J. 257.

27. California, Colorado, Delaware, Indiana, Maine, Massachusetts, Michigan, Missouri, New Jersey, New York, Pennsylvania, Oklahoma, and Hawaii.

28. Louisiana, New Mexico.

29. Minnesota, Tennessee, Rhode Island.

30. Kansas, Nebraska, Kentucky, Texas, New Hampshire, and Alaska.

with the commissioner. In Wisconsin such a settlement is subject to review by the Commission within one year. Only a few of the acts have no provision for the settlement of the terms of compensation by agreement of the parties.[31]

Many states do not permit settlements within a definite period following the date of injury, and where a settlement is made within such period, a presumption of fraud is raised. In Illinois and Missouri the time limit is seven days, in Iowa, twelve days, in Connecticut the waiting period must have expired. Several states have a limit of fourteen days.[32]

When a dispute arises and the parties cannot agree upon the terms of compensation, the methods differ widely. Under the court type of act the cases go to the inferior court directly,[33] or in Kansas an arbitration committee may be appointed by the court or agreement of the parties. In Minnesota the department of labor is authorized to attempt to settle the controversy.[34] In the states operating under the court type, should the action of the above mentioned agencies prove futile, the parties have recourse to actions in the courts. The court actions are summary and without jury except under certain conditions in Kansas[36] and Wyoming.[37] In the rest of the states the Commissioner, Board or Commission is given the authority to settle the disputes.

The commission in some states may settle the disputes upon application of any party in interest.[38] The Commissioner conducts the hearing in Connecticut and Nebraska, the chairman of the Commission in Maine. In Iowa an arbitration committee may be appointed by the commissioner or the parties in interest and the commisssioner; the decision of the committee being subject to review by the commissioner. In Massachusetts the case is assigned for a hearing before a member of the Board. In Pennsylvania

31. Maryland, Montana, Nevada, Ohio, Oregon, Porto Rico, Utah, Wyoming, Washington, and West Virginia.

32. Indiana, New York, Pennsylvania, and Oklahoma.

33. Alaska, Louisiana, Minnesota, New Hampshire, New Jersey, New Mexico, Rhode Island, Tennessee, and Wyoming.

34. Part 2, Sec. 24a.

36. Sec. 36, Workmen's Compensation Law.

37. Sec. 12, Workmen's Compensation Law.

38. Missouri, California, Colorado, Vermont and New York.

the claim is presented to the Board for determination by a referee after hearing. Illinois at the election of either party the Board appoints an arbitrator, or in case of death or permanent disability an arbitration committee. The decision of the committee or arbitrator is subject to review by the Board, if petition for review is filed within fifteen days. In Idaho, Hawaii and Oklahoma either party may apply for an arbitration committee, and upon application the award of the arbitration committee may be reviewed by the Commission or Board. The Board settles all disputes after hearing in Delaware and Montana. In some states, including Indiana, Kentucky, Michigan and Missouri a member of the board may hold the hearing and make the award, subject to a review by the full Board upon application. In some states all terms of compensation whether in dispute or not are settled by the Commission or Board.[39]

The Board may have jurisdiction where there has been no denial of liability, in other words, no dispute, but a failure to pay any compensation under the act. "The failure to pay according to the provisions of the statute amounts to a denial of the claim for compensation and gives rise to a question for the determination of the Industrial Board."[40]

Texas has a dual procedure which permits submission of a claim for compensation to either the Industrial Accident Board or the Courts.[41]

It has been held that where statutory amendments affect only the procedure, they apply to actions instituted prior to the passage of the amendment. Since it affects only the procedure it does not disturb vested rights, nor impair contract obligations.[42]

When a case has been remanded to the Industrial Board for rehearing because of irregularities in the proceedings, evidence

39. Oregon, Ohio, Utah, Texas, West Virginia and Maryland.

40. R. F. Conway Co. v. Industrial Board of Ill., 282 Ill. 313, 118 N. E. 705, 16 N. C. C. A. 745, 1 W. C. L. J. 752.

41. Texas Employers' Ins. Ass'n v. Roach, —Tex. Comm. of App.—, 222 S. W. 159, 6 W. C. L. J. 400.

42. Kuca v. Lehigh Valley Coal Co., —Pa.—, 110 Atl. 731, 6 W. C. L. J. 499; Vulcan Detinning Co. v. Indus. Comm., —Ill.—, 128 N. E. 917, 7 W. C. L. J. 191.

adduced after the remanding may be considered in connection with the evidence previously taken, and also the compensation agreement.[43]

In a Kansas Case a woman, who claimed to be the wife and sole dependent of a deceased workman, recovered judgment for his death against his employer under the Workmen's Compensation Act. The woman died, and, after her death, the judgment was revived in the name of her administrator and that of the deceased workman, and the administrator and guardian of a minor child of the deceased was substituted for the plaintiff. On a motion for a new trial, it was shown that the plaintiff was not the wife of the deceased workman, that another woman then living was his wife, and the plaintiff had knowledge of that fact. It was held, that a motion for a new trial was the proper way of correcting this error and that the judgment should have been set aside, and that a new trial should have been granted.[44]

Under the Kansas Act if the employer "and the injured em ployee do not agree as to the nature and extent of the injuries, so far as these things affect the duration of the disability, and the differences between them are not submitted to arbitration, a dispute exists which authorizes the employee to maintain an action to have the facts determined.

"Where the employer raises by his answer the question of the duration and extent of the workman's incapacity, and offers evidence in support of such answer, he cannot be heard to say that there was no dispute at the time the action was commenced."[45]

Under the Maryland Act questions of fact should be framed and presented so that they may be passed upon by the court before the jury is sworn, in proceedings under the compensation act.[46]

It has been held in Oregon that the fact that a proceeding for compensation under the Workmen's compensation act is pending

43. Miller v. Diamond Ice & Coal Co., —Del.—, (1920), 111 Atl. 745, 7 W. C. L. J. 185.

44. Stokes v. Morris & Co., —Kan.—, 191 Pac. 264, 6 W. C. L. J. 444. (1920).

45. Sillix v. Armour & Co., —Kan.—, 162 Pac. 278, A 1 W. C. L. J. 626.

46. Central Const. Corp. v. Harrison, —Md. App.—, 112 Atl. 627.

in another state is not ground for abatement as a matter of right, and in the absence of abuse of discretion a ruling of the trial judge will not be interfered with.[47]

Mandamus is not the proper remedy for the enforcement of an award, execution should be issued,[48] or an action at law instituted, although mandamus is often an appropriate remedy against the commission.[49]

§ 551. **Pleading.**—The compensation acts usually provide that proceeding before the board or commission shall be as simple and summary as possible, hence the technical rules of common law and code pleading[50] are not as a rule observed in compensation proceedings before boards and commissions but are more nearly followed where the court form of act prevailes. Though the Louisiana Act, which is the court form, expressly emancipates cases under the act from the "technical or formal rules of proceedure."[51]

Some of the acts set out the essentials of a proper application for compensation, and the preliminary notice to the employer and the request for arbitration where such procedure is provided under the act. Most boards and commissions have provided printed forms to be filled out by the parties to compensation proceedings.

The application or claim for compensation made to the commission board or court should in general set forth the names and residences of the parties and the facts relating to the employment at the time of the injury, the character and extent of the injury, the amount of wages being received at the time of the injury, the

47. Rorvik v. N. Pac. Lbr. Co., —Ore.—, (1921), 195 Pac. 163.

48. Roach v. Texas Employers' Ass'n, —Tex. Civ. App.—, 195 S. W. 328, B 1 W. C. L. J. 1583.

49. State ex rel. Brown v. Nevada Indus. Comm., —Nev.—, 161 Pac. 516, B 1 W. C. L. J. 1117.

50. Hagenback v. Leppert, —Ind. App.—, 117 N. E. 531, 1 W. C. L. J. 64; United Paper Board Co. v. Lewis, —Ind. App.—, 117 N. E. 276, 15 N. C. C. A. 688.

51. Whittington v. Louisiana Sawmill Co., —La.—, 76 So. 754, A 1 W. C. L. J. 718; Pierre v. Barringer, —La.—, (1920), 88 So. 691.

knowledge of employer or notice of the occurrence of the injury and such other facts as may be necessary and proper for the information of the court, commission or board, and where the act provides for the settlement of compensation claims between the parties without the intervention of the court, commission, referee or arbitrator, and the parties are unable to agree, it is usually required that the application, petition, claim or complaint, state the matter or matters in dispute and the contention of the petitioner with reference thereto and often certain jurisdictional facts are required to be stated. Usually it is required that such pleading, if it may be so designated, shall be verified. The answer which is also usually required to be verified either admits or denies the substantial averments of the application, petition, claim or complaint and states the contention of the defendant with reference to the matters in dispute as disclosed by the claimant's pleading. Practitioners are advised to apply for the forms usually prepared by the boards or commissions of the various states. Since only a few of the states have the court form of act, the decisions involving pleading arise most often in common law cases wherein the claimant for one reason or another pleads exemption from the compensation act, or where the defendant in such action pleads the application of the act.

In a Kansas case the court said: "We find nothing substantial in the complaint that defendant was prejudiced because the petition charged generally that the incapacity resulted from the injury and because the petition made no claim that the injury aggravated a pre-existing disease. In the ordinary compensation cases the issues are intended to be simple and except for certain facts which the statute makes essential, the pleadings are of little importance. Where the petition charges incapacity resulting from an accident, the employer may not unreasonably be expected to meet evidence showing that as a result of the accident, a disease from which the plaintiff already suffered, was aggravated, causing partial or total incapacity for work. Probably at the time the petition in this case was drawn neither the plaintiff nor his at-

torneys knew of such disease as multiple sclerosis. We discover no error in the record and the judgment is affirmed."[52]

The petition in proceedings for compensation under the Maine Act should show the nature of the claim, whether for total or partial incapacity, for specific compensation or for permanent impairment of the member;[53] and is insufficient if it fails in this respect.[54]

"In order to set forth a cause of action or sufficient complaint to the judge of the district court under the Louisiana Act, it is only necessary that the petition of the injured employee or of the dependents of a deceased employee contain the allegations required in paragraph 1 of section 19 of the Act No. 20 of 1914."[55]

Under the New Jersey Act the plaintiff must set out in his pleading whether he seeks compensation under section I or II of the Act. In a recent case the court said: "When the plaintiff instituted his action he was subject to the statutory presumption that his intestate was, at the time of his death, working under a contract governed by section II of the Compensation Act, and could not recover under section I unless he was able to overcome that presumption by showing an express contract, or a notice, in writing made before the accident, that section II did not apply. And the fact that the defendant did not plead the want of these requisites does not help the plaintiff, because it is not necessary to plead a presumption of law. Bennington Iron Co. v. John Rutherford, Jr., 18 N. J. Law, 105, 35 Am. Dec. 528. The present case is substantially like that passed on by this court in Gregutis v. Waclark Wire Works, 86 N. J. Law, 610, 92 Atl. 354, in which Mr. Justice Trenchard says:

'Since the complaint does not aver that the contract contained any express statement, in writing, that section II of the act was not intended to apply, nor that any written notice to the effect was given, it is presumed that the parties accepted and were bound by the provisions of that section.'

52. Blackburn v. Coffeyville Vitrified Brick & Tile Co., —Kan.—, (1920), 193 Pac. 351, 7 W. C. L. J. 58.

53. Maxwell's Case, —Me.—, (1921), 111 Atl. 849.

54. Clark v. Kennebec Journal Co., —Me.—, (1921), 113 Atl. 51.

55. McGuirt v. Gillespie, —La.—, 75 So. 419, A 1 W. C. L. J. 702.

"The effect of the case is that in an action by an employee for injuries suffered in the course of, and growing out of his employment, he must aver, if he wishes to avoid the application of section II of the Workmen's Compensation Act, an agreement in writing, or a written notice given prior to the accident, such as is required by the statute, and what he was bound to aver as a cause of action he must prove, and if he fails in this he has not made out his right to recover. Not having done that in this case, defendant was entitled to a direction in its favor, and therefore the refusal to accede to the defendant's request was an error for which this judgment must be reversed; and it is so ordered."[56]

A complaint filed in court alleging injury by the employer's negligence in failing to supply a safe place to work, states no reasons sufficient to justify bringing an action other than that provided under the workmen's compensation act, since it provides exclusive remedies for accidental injuries arising from such omission.[57] And the complaint must allege facts which bring the employment within one of the exceptions to the act, to be valid.[58]

A petition by the deceased's widow in her right and as guardian of a minor child, stating that her husband's death resulted from an accident arising out of and in the course of his employment, the daily wage, names, ages, and relationship of dependents, is sufficient to support an award of the Industrial Commission.[59]

A declaration, in a suit for damages for personal injuries to a city employee, which shows that the defendant was not operating under the workmen's compensation act, does not state a cause of action under the workmen's compensation act. Since a city is engaged in hazardous and non-hazardous employments a petition need not show that the plaintiff did not come within that class

56. McNutt v. Adams Express Co., —N. J.—, (1920), 111 Atl. 13, 6 W. C. L. J. 553; Randolph v. Hammersley Mfg. Co., —N. J.—, (1920), 111 Atl. 15, 6 W. C. L. J. 555.

57. Boyle v. A. C. Cheney Piano Action Co., 184 N. Y. S. 384, 7 W. C. L. J. 93.

58. Steagall v. Sloss Sheffield Steel & Iron Co., —Ala.—, (1920), 87 So. 787.

59. Utah Copper Co. v. Indus. Comm., —Utah—, (1920), 193 Pac. 24, 7 W. C. L. J. 147.

of work designated as hazardous, as there is no presumption that he was subject to the act.[60]

Under Public Statutes of New Hampshire (1901) Sec. 8, allowing amendments in matters of substance at any stage in the proceeding to prevent injustice, a declaration in a case based on negligence may be amended so as to allege that defendant was within the terms of the compensation act and had not accepted the terms thereof, which merely gives notice of the plaintiff's intention to claim the benefits of the common-law rules of liability in her favor.[61]

It has been held that under the provision of the Louisiana Act giving the court discretion to allow amendments at any stage of the proceedings, that a plaintiff seeking to recover for the death of an employee under the law prior to the enactment of the compensation act, should be allowed to amend so as to show a cause of action under that act.[62]

Under the Louisiana Act the servant may bring an ordinary suit asking for damages or in the alternative requesting compensation if it be found that the compensation act applies and the defendant cannot complain of being allowed 10 days to answer instead of the less number of seven provided for under the compensation act.[63]

But a prayer that, should the court hold the case to be governed by the compensation act, then "an adequate and equitable relief and an equitable lump sum be adjudicated according to the said act, adding to it an equitable sum for suffering, mental agony, loss of consortium, and pecuniary loss" was held insufficient to justify a judgment under the act.[64]

60. O'Brien v. Chicago City Ry. Co., —Ill.—, (1920), 127 N E. 389, 6 W. C. L. J. 144.

61. Watts v. Derry Shoe Co., —N. H.—, 109 Atl. 837, 6 W. C. L. J. 71.

62. Whittington v. La. Sawmill Co., —La.—, 76 So. 754, A 1 W. C. L. J. 718.

63. Norwood v. Lake Bisteneau Oil Co., 145 La. 823, 83 So. 25, 19 N. C. C. A. 924, 5 W. C. L. J. 76.

64. Colorado v. Johnson Iron Works, —La.—, 83 So. 381, 5 W. C. L. J. 392.

In pleading the Illinois Act as a defense to an action for injuries to an employee in Missouri, the defendant need not allege that the employee was not engaged in one of the exempted pursuits under the act in order that such fact may be shown.[65]

A declaration at common law for injury to a servant must, to state a cause of action, state what is essential under the compensation act to maintain such an action, or in other words the facts that exclude the application of the act, that either the employee or his employer was not operating under the act, or where the action proceeds on the theory that the employment was casual, the declaration must affirmatively show this fact.[66]

But where the suit is brought to recover the amount paid for the death of an employee due to the negligence of a third party, a complaint is not defective because it fails to allege that the defendant had not elected to come under the Illinois Act.[67]

Where an assenting employer wishes to avail himself of the exemption from suits created by the Maine Act, he must plead and prove such exemption. An employee injured by the negligence of a non assenting employer must allege due care on his part and need not allege the employer to be non assenting. If the employee fails to plead due care on his part, he must then show that the defendant belongs to a class of large employers, that he was an employee of the defendant in a specified occupation where more than five workmen were employed, and that the injury was caused by the negligence of the employer or of some person for whose care the employer was responsible. It is not inconsistent for the plaintiff to join in separate counts that he was himself in the exercise of due care and that the defendant belonged to a class of employers against whom plaintiff's care was immaterial.[68]

65. Mitchell v. St. Louis Smelting & Refining Co., —Mo. App.—, 215 S. W. 506, 19 N. C. C. A. 390, 5 W. C. L. J. 82.

66. Bishop v. Chicago Rys. Co., —Ill.—, (1920), 124 N. E. 837, 5 W. C. L. J. 175; Reynolds v. Chicago City Rys. Co., —Ill.—, 122 N. E. 371, 3 W. C. L. J. 608.

67. Vose v. Cent. Ill. Pub. Serv. Co., —Ill.—, 122 N. E. 124, 3 W. C. L. J. 613.

68. Nadaeu v. Caribou Water, Light & Power Co., —Me.—, 108 Atl. 190, 5 W. C. L. J. 238.

In an action founded upon the willful misconduct of the employer the plaintiff must allege and prove that such conduct amounts to gross negligence or willful misconduct, and that the conduct was personal on the part of defendant or his elective officer and indicated willful disregard for the employee's safety.[69]

An answer in a workmen's compensation proceedings may be signed and sworn to by another for the defendant without showing his authority, if accepted by the board. And if the plaintiff wishes to take exception to the form of the answer, he should specifically state his exception and asked for a ruling before going to trial.[70]

The defense, to an admiralty action, that the petitioner has recovered under the compensation act, must be pleaded.[71]

In a common law action in Minnesota where the defendant claims that the Iowa compensation act applies, he must plead and prove that fact.[72]

Where it appears in the petition that the plaintiff's employment was one of the class covered by the act, the failure of the defendant to comply with the provisions of the act must be pleaded to show a cause of action. Where it does not appear in the petition that the employment was of a hazardous nature no presumption arises.[73]

In Maryland it is held to the contrary. The defendant being required to prove that he has complied with the provisions of the act in order that he may defeat the action.[74]

An employer's motion for judgment on the pleadings will be granted, with leave to serve an amended complaint. The action

69. Helme v. Great Western Milling Co., —Cal. App.—, 185 Pac. 510, 5 W. C. L. J. 143.

70. O'Brien v. Fuch, —Pa.—, (1920), 109 Atl. 158, 5 W. C. L. J. 745.

71. Hogan et ux. v. Buja, (La.), 262 Fed. 224, (1920), 5 W. C. L. J. 647.

72. Nash v. Minn. & St. L. R. Co., —Minn.—, 169 N. W. 540, 3 W. C. L. J. 157.

73. Baggs v. Standard Oil Co. of New York, 180 N. Y. S. 560, (1920), 5 W. C. L. J. 740; Rudy v. Morse Dry Dock & Repair Co., 176 N. Y. S. 731, 4 W. C. L. J. 448; Louis v. Smith McCormick Const. Co., —W. Va.—, 92 S. E. 249, B 1 W. C. L. J. 1637.

74. Solvuca v. Ryan & Reilly Co., —Md.—, 98 Atl. 675.

for damages for personal injuries being based on the employer's failure to secure the payment of compensation.[75]

Failure to allege that an accident, was purely and wholly accidental if aided by the evidence, is not open to objection for the first time on appeal.[76]

It is held under the Maine Act that where an employer is subrogated to the employee's right of action against a negligent third party by the provisions of the act, it is not necessary to allege or show payment by the employer or insurer.[77]

In Oklahoma when the allegations and proof bring a case within the compensation act, it is controlled by the provisions of the act although the pleadings make no reference to its provisions.[78]

"Section 11 in effect takes out of the operation of section 1902 of the New York Code the right to enforce liability in certain cases embraced within the terms and conditions of the Compensation Law. It ingrafts a limitation upon the liability enforceable under that section. In this respect it may be contended, I think, with some plausibility that section 11 operates as, and performs the functions of, a proviso. It is a subsequent enactment, and it curtails the rights enforceable under a prior statute. If this section may be considered as a proviso then the plaintiffs made out a prima facie case when they stated a cause of action under section 1902 of the Code. They are not bound to negative section 11 of the subsequent act. See Rowell v. Janvrin, 151 N. Y. 60, 67, 68, 45 N. E. 398.

"I think this motion may be entertained nothwithstanding that an answer containing denials has been interposed. See the following cases: Longenecker v. Longenecker, 140 N. Y. Supp. 403; Guggenheim v. Guggenheim, 95 Misc. Rep. 332, 159 N. Y. Supp. 333; Spielberg v. Canada S. S. Lines, 98 Misc. Rep. 304, 162 N. Y. Supp. 610; Schleissner v. Goldsticker, 135 App. Div. 435, 120 N. Y. Supp. 333; Olsen v. Mfg. Co., 143 App. Div. 142, 127

75. Campoccia v. Panama Ry. Co., 181 N. Y. S. 883, (1920), 5 W. C. C. L. J. 883.

76. Smith v. White, —La.—, (1920), 83 So. 584, 5 W. C. L. J. 531.

77. Donahue v. Thorndike & Hix, —Me.—, 109 Atl. 187, 5 W. C. L. J. 855.

78. Lusk v. Bandy, —Okla.—, 184 Pac. 144, 4 W. C. L. J. 726.

N. Y. Supp. 697: O'Rourke v. Patterson, 157 App. Div. 284, 142 N. Y. Supp. 195; Field v. Empire Case Goods Co., 179 App. Div. 253, 255, 166 N. Y. Supp. 509.

"It was held in Nilsen v. Am. Bridge Co., 221 N. Y. 12, 116 N. E. 383, that in a common-law action, where it does not appear from the complaint that plaintiff was engaged in an employment classed as hazardous in the Workmen's Compensation Law, the question was not presented whether the plaintiff, by reason of said law, is barred from the right to recover, and that, therefore, a demurrer to the complaint cannot be sustained upon the ground that the complaint failed to state facts constituting a cause of action, merely because the remedy provided in the Compensation Law is exclusive. By analogy this reason seems to be applicable to the present case.

"The defendant's motion for judgment on the pleading should, I think, upon these considerations be denied." [79]

Where a petition shows on its face that the accident did not arise out of and in the course of the employment it is demurrable.[80]

A denial by the plaintiff in his reply of any knowledge or information sufficient to form a belief, was held sufficient to put in issue defendant's allegation that he had complied with the workmen's compensation act. Where other paragraphs of the reply specifically denied each and every allegation contained in the answer, it was not necessary to allege affirmatively in the complaint that the defendant failed to secure payment, where the case pleaded showed on its face that it did not come within the act.[81]

In a California case the court said: "Appellant further contends that the complaint has no expressed allegation that the plaintiff is an insurance carrier, and that it is only by such an al-

79. Basso v. John Clark & Son, —N. Y.—, 177 N. Y. S. 484, 4 W. C. L. J. 530.

80. American Indemnity Co. v. Dikins, —Tex. Civ. App.—, 211 S. W. 949, 4 W. C. L. J. 294.

81. Morris v. Muldoon, —N. Y. —, 177 N. Y. S. 673, 4 W. C. L. J. 623.

legation that plaintiff can bring itself within the terms of the law subrogating it to the rights of Bellah. The amended complaint alleges that prior to the 21st day of April, 1916, the plaintiff, by its policy of insurance in writing, did insure the said Max Flentge and his employees at the time of the making of the policy; that said policy was written under and in conformity with the terms of a certain act of the Legislature, designated as the "Workmen's Compensation, Insurance and Safety Act," etc. (St. 1913, p. 279). This allegation, under the law respecting insurance companies, carries with it an implied allegation that the plaintiff was an insurance carrier. The omission of an allegation necessarily implied from other allegations is immaterial. Richter v. Union Land, etc., Co., 129 Cal. 367, 62 Pac. 39."[82]

A failure to allege that the defendant had not elected to come under the act does not make insufficient the complaint in an action for damages for personal injuries since there is no presumption that the employer comes under the Oregon Act.[83].

Where neither party pleaded the workmen's compensation act, testimony that a claim had been filed under the act is properly excluded.[84]

Where an employer abandoned the second paragraph of his answer setting up the defense of wilful misconduct he thereby waived such defense.[85]

The employee has succeeded in making a prima facie case where the complaint alleges the relation of employer and employee, that the injury arose out of and in the course of the employment, that the employee had rejected the act and that damages were sustained.[86]

82. Royal Indem. Co. v. Midland Counties Public Service Corp., —Cal. App.—, 183 Pac. 960, 4 W. C. L. J. 689.

83. Garvin v. Western Cooperage Co., —Ore.—, 184 Pac. 555, 4 W. C. L. J. 738; Olds v. Olds, 88 Ore. 209, 171 Pac. 1046.

84. Arkansas Valley Ry., Light & Power Co. v. Ballinger, —Colo. —, 178 Pac. 566, 3 W. C. L. J. 581.

85. National Car Coupler Co. v. Marr, — Ind. App. —, 121 N. E. 545, 3 W. C. L. J. 456.

86. Balen v. Colfax Consol. Coal Co., —Iowa—, 168 N. W. 246, 2 W. C. L. J. 621.

Where the original petition set forth no cause of action under the Louisiana Act and the supplemental petition was not filed within the year following the date of the accident a plea of prescription is without merit.[87]

A rule of the Indiana Board that if no answer is filed, allegations contained in the complaint will be deemed to be denied is proper.[88]

Under some acts the statute of limitations must be pleaded as a defense,[89] while under other acts it need not be pleaded.[90]

The bringing of a claim within the time specified in the compensation act is satisfied, where an action for damages was filed within the proper time and later amended so as to ask for compensation.[91]

Where an employer has rejected the act the employee need not allege his own rejection of the act, for the rejection of the employer precluded the employee from the right of election.[92]

The defense of an action for damages for personal injuries that the employee had elected to accept compensation is not available unless pleaded in the answer.[93]

A petition failing to state facts from which the average earnings may be computed is not fatal where there is no motion to make more definite and certain.[94]

Under the Nebraska Act the petition should set up the accident and character of the injury, which should likewise be shown in

87. Philps v. Guy Drilling Co., —La.—, 79, So. 549, 2 W. C. L. J. 783.

88. Zeitlaw v. Smock, —Ind. App.—, 117 N. E. 665, 1 W. C. L. J. 174.

89. U. S. Fidelity & Guar. Co. v. Pillsbury, —Cal.—, 161 Pac. 982; Red Wood Lumber Co. v. Pillsbury, —Cal.—, 161 Pac. 982.

90. Bushnell v. Indus. Bd., —Ill.—, 114 N. E. 496, See Chapter XV Notice and Limitation, page 1453 ante.

91. Ackerson v. Nat. Zinc. Co., 96 Kan. 781, 153 Pac. 530.

92. Favro v. Superior Coal Co., 188 Ill. App. 203.

93. Behringer v. Inspiration Consol. Copper Co., —Ariz.—, 149 Pac. 1065; Spottsville v. Western States Portland Cement Co., 94 Kans. 258, 146 Pac. 356.

94. Sillix v. Armour & Co., —Kans.—, 160 Pac. 1021.

the judgment together with the nature and extent of the disability and the time for which periodical payments are to be made.[95]

On a petition for review where the employer made no application for further time to produce testimony, his rights were not prejudiced by the board proceeding to determine the matter even though the petition for review did not ask for a grant of further compensation.[96]

Under the Texas Act the employer must plead the fact that he has less than six employees in order to be able to avail himself of the defenses permitted him under such fact by the terms of the statute.[97]

Where a complaint failed to allege the nature of the business plaintiff was engaged in at the time of his injury, it does not establish the fact that the parties were subject to the provisions of the Workmen's Compensation Act, and a demurrer will not present the question of whether such act prevents the plaintiff from maintaining a common-law action.[98]

In a proceeding under the workmen's compensation act, the employer need not, by formal pleading, raise the question whether the employee is entitled to compensation within the act.[99]

In a proceeding for compensation under the Minnesota Act, "The joint answer of the employer and insurer alleged that defendants were ready and willing to pay plaintiff the compensation due him under the act, and willing to pay reasonable hospital and medical expenses. Under this answer plaintiff was not obliged to prove compliance with the provisions of the act necessary to make the insurer liable directly to the injured workman, and defendants are barred from resisting the claim for medical

95. Hanley v. Union Stock Yards Co., —Neb.—, 158 N. W. 939.

96. Curtis v. Slater Const. Co., —Mich.—, 100 N. W. 659; Gauthier v Penobscot Chemical Fiber Co., —Me.—, 1921, 113 Atl. 28.

97. Dunaway v. Austin St. Ry. Co., —Tex. Civ. App.—, 195 S. W. 1157, B 1 W. C. L. J. 1538.

98. Nilsen v. American Bridge Co., — N. Y. App. Div. —, 116 N. E. 1 W. C. L. J. 121.

99. Aurora Brewing Co. v. Indus. Bd., —Ill.—, 115 N. E. 207.

expenses set up in the complaint on the ground that their own physician was ready to perform the services.'"[1]

In an action against an employer who has rejected the act, the employer must plead as his defense or in mitigation, that no negligence of his was the proximate cause of the injury, that the servant was wilfully negligent, or negligent as the result of intoxication, or that the servant was guilty of contributory negligence, if he wishes to avail himself of them.[3]

A declaration, in an action for injuries sustained in the course of the employment, alleging operation under the act, and, among other proper allegations, that though often requested to do so by the plaintiff the defendant refused to appoint an arbitrator in accordance with the provisions of the act, does not render the declaration subject to demurrer.[4]

In proceedings under the act of Illinois, the claimant need not show that he was not within the class of casual employees, as that is a matter of defense.[5]

Superfluous allegations in a petition for compensation may be disregarded and are not prejudicial where no evidence is admitted concerning them and the court charged that they were not to be considered.[6]

A refusal to strike out allegations of negligence, in a proceeding under the compensation act, is not prejudicial where issues as to the extent of the disability were covered by special findings and the general verdict was disregarded.[7]

A petition against a partnership in the firm name is a valid claim against the partners individually.[8]

1. State ex rel. John Wunder Co. v. District Court of Hennepin County, —Minn.—, 161 N. W. 391, B 1 W. C. L. J. 1080.

3. Hunter v. Colfax Consol. Coal Co., 175 Iowa, 245, 157 N. W. 145, L. R. A. 1917 D. Ann. Cas. 1917E, 803; amending opinion, 154. N. W. 1037.

4. Reese v. Bartlett, 197 Ill. App. 272; Rushing v. Bartlett, 197 Ill. App. 278.

5. Victor Chemical Wks. v. Indus. Bd., 274 Ill. 11, 113 N. E. 173.

6. Sillix v. Armour & Co., 99 Kan. 103, 160 Pac. 1021, Judgment Modified 99 Kan. 426, 162 Pac. 278.

7. Oliver v. Christopher, 98 Kan. 660, 159 Pac. 397.

8. Heinze v. Indus. Comm., 288 Ill. 342.

In a common-law actoin, in Illinois, for personal injuries an employer can prove under the general issue, that it was bound to pay compensation under the workmen's compensation act, even though the petition contained no allegation that the employer rejected the act; the jurisdiction of the court depending upon whether the defendant was so bound.[9]

Where an answer, which seeks to bring an employee within the compensation act on the ground that she was engaged in an employment in which four or more workmen or operatives were engaged in the same employment, fails to allege that the plaintiff was one of the four operatives regularly employed, it is demurrable. And if there are no facts pleaded in the complaint to bring the case within the statute, it is not necessary to plead a failure on the employer's part to secure payment of compensation as provided by law in order to take it out of the purview of the statute again.[10]

In suing to set aside an award of compensation, an employee may amend his complaint by setting up, as an additional ground, certain matter relating to a settlement by the injured employee with a third person whose negligence caused his injuries, providing such new matter does not amount to a new cause of action.[11]

Where a rule of the Industrial Commission provides that an employer relying upon the special defense of willful misconduct, must plead such defense by affirmative answer, five days before the date set for final hearing, a failure to so plead will exclude any such issue.[12]

9. Zukas v. Appleton Mfg. Co., —Ill.—, 116 N. E. 610, A 1 W. C. L. J. 464.

10. Michel v. American Cinema Corp., 182 N. Y. S. 588, (1920), 6 W. C. L. J. 375; Nilsen v American Bridge Co, 221 N. Y. 12, 116 N. E. 383.

11. Harloff v. Merwin, —Wis.—, (1920), 177 N. W. 913, 6 W. C. L. J. 416.

12. Cudahy Packing Co. v. Zafinopoulos, —Ind. App.—, (1920), 129 N. E. 32, 7 W. C. L. J. 196.

Where a foreign corporation did business in a foreign state, where an accident happened to its employee, in the absence of anything to show that the employee has any remedy under the compensation act of any state, the employer will not be allowed any such defense, when this question is first raised after the verdict of the jury.[13]

Where the statute provides, that an employer who has failed to comply with the insurance provisions of the act shall be deprived of the benefits of the act, and a third person seeks to evade liability on the ground that the act provides the exclusive remedy, compliance with the insurance provisions by the injured person's employer is an affirmative defense to be pleaded and proved by the defendant.[14]

In an action against a negligent third party, if the defendant wishes to avail himself of the defense that the employee has been paid compensation by his employer, he must plead such fact, and cannot introduce evidence to that effect under a general denial.[15]

The amending of a petition, which had been filed in the injured employee's name, so as to show that he had been paid compensation, that he and his employer were subject to the provisions of the act and the employee's election to take compensation under the act, was permissable in an action by the employer against a negligent third party. Since the defendant's liability was the same whether the action was prosecuted for the benefit of the employer or the injured employee.[16]

§ 552. **Proceedings to Increase, Diminish or Terminate Compensation**—Most of the American Compensation Acts, with the exception of Wyoming and New Hampshire, have provisions permitting the review of an award with a view to increasing, diminishing or terminating compensation on the ground that

13. Simpson v. Atlantic Coast Shipping Co., —App. Div.—, (1920), 182 N. Y. 331.

14. Madden v. N. Pac. R. R. Co., 242 Fed. 981, (Wash.), A 1 W. C. L. J. 91.

15. McHugh v. Williams & Payton, —R. I.—, (1920), 6 W. C. L. J. 506.

16. Davis v. Cent. Vermont Ry. Co., —Vt.—, (1921), 113 Atl. 539.

the disability has changed or upon the ground of mistake. The award may be changed at any time under many of the acts,[17] but only during the compensation period in Connecticut and Rhode Island. The award can be reviewed every six months in Delaware, Idaho and Hawaii. It can be changed in Iowa unless the award has been commuted. If compensation is awarded for more than six months a few states permit change after the six months period.[18] In Wisconsin upon the ground of mistake the award may be changed by the board, but must be corrected within twenty days. Where under that authority the Commission changed an award to conform to the facts, the correction was regarded as referable to the date of the award.[19] In Louisiana and New Jersey an award may be corrected after one year, within eighteen months in Illinois, 245 weeks in California, 15 days in Colorado, and two years in Maine. But this limitation in the Maine Act has been qualified by a recent decision.[20]

Where the employer sought to terminate compensation payable to the dependent widow of a deceased employee because of the fact that she remarried and was no longer a dependent, it was held on appeal that the award would not be disturbed as there was no provision in the act permitting of an inquiry into any change in that status.[21]

In accord with the foregoing case, is the Illinois holding in which the court said: "The Workmen's Compensation Act, con-

17. Missouri, Kentucky, Maryland, Michigan, Montana, Nevada, South Dakota, Washington, West Virginia, Utah, Texas, New York, Ohio, Oklahoma, Pennsylvania, Oregon, and Vermont; U. S. Fidelity & Guar. Co. v. Davis, — Tex. Civ. App. —, (1921), 223, S. W. 700, 6 W. C. L. J. 594; Choctaw Portland Cement Co. v. Lamb, — Okla. —, (1920), 189 Pac. 750, 6 W. C. L. J. 207.

18. Tennessee, Nebraska, Minnesota.

19. Foster-Latimer Lumber Co. v. Industrial Comm. of Wis., 167 Wis. 337, 167 N. W. 453, 16 N. C. C. A. 752.

20. Gauthier v. Penobscot Chemical Fiber Co., —Me.—, (1921), 113 Atl. 28.

21. Bott's Case, 230 Mass. 152, 119 N. E. 755, 2 W. C. L. J. 273, 16 N. C. C. A. 864; In re Lomax, Ohio, Ind. Comm. No. 53138, 13 N. C. C. A. 188.

tains no provision for the extinguishment of compensation where the widow of the deceased employee remarries, and we can see no reason, on principle, for reading such a provision into the act. We do not adopt the view of counsel for plaintiff in error that the basis of the act is merely that of providing support through a 'period of adjustment,' but, as its title indicates, the act is based on the idea of compensation for death or injury arising out of and in the course of the employment."[22] Some states, including Connecticut, Indiana, Deleware, New Jersey, Kansas, Kentucky, Vermont, Iowa and Tennessee, have provided that the remarriage of the dependent widow or husband shall terminate compensation. Section 16, paragraph 2, of the New York Act provides that in case of the remarriage of the widow two years compensation shall be paid in lump sum and further payments cease. In a Michigan case the employer contended that the Board had no jurisdiction to reopen a case and make further award. The court said that, "When the employer and employee agree upon compensation and file their written agreement with the Industrial Accident Board and it is approved, jurisdiction of the parties is thereby conferred upon the Board to act in the premises."[23] In the above case the original settlement had never been filed with and approved by the Board. In another case in which the original settlement had been filed but not approved, the court said that, "Until this is done the agreement is not final."[24]

And where the case was reopened upon petition of the claimant after a final settlement had been filed, the court held that the board was justified in reopening the case, but that the burden was upon the one petitioning to reopen, to establish that the claimed disability was a result of the injury.[25]

22. Wangler Boiler & Sheet Metal Works Co. v. Ind. Comm. et al., 287 Ill. 118, 122 N. E. 366, 3 W. C. L. J. 617.

23. Adams v. W. E. Woods Co. et. al., 203 Mich. 673, 169 N. W. 845, 3 W. C. L. J. 311.

24. Shaffer v. D'Arcy Spring Co. et. al., 199 Mich. 537, 165 N. W. 825, 1 W. C. L. J. 418.

25. Weidner v. Northway Motor Mfg. Co. et al., 205 Mich. 583, 172 N. W. 574, 4 W. C. L. J. 254.

Indiana has a provision that "on the ground of a change in condition" the board may review the award and "may make an award ending, diminishing, or increasing the compensation previously awarded," providing a petition for review is filed within one year from the termination of the compensation period fixed in the original award. Where, under the above provision, a further award is made and the case closed, if there is evidence to support the award, it will not be set aside upon appeal.[26]

In a Colorado case the commission made an award and retained jurisdiction of the case. The order provided that the claimant might apply for further relief should his disability extend beyond the time allowed in the award. After further award had been made upon the claimant's application, the employer appealed. The court said: "When the (first) award was made the full extent of the claimant's disabilities were not ascertained. * * * and * * * was not final in the sense that regardless of the future physical condition of claimant neither he nor insurer should be permitted to show such physical change. For this reason the Commission not only had the right, but it was its legal duty, to retain jurisdiction of the case for further action and award if the facts should so warrant."[27] Under Sec. 19 (h) of the Illinois Act an award may be reviewed within eighteen months after the award on the ground that the disability has recurred, increased, diminished or ended. And where, under the above provision, there is sufficient evidence to support an increase in the award, it is conclusive upon the courts.[28]

26. Pedlow v. Swartz Electric Co., (Ind. App.), 120 N. E. 603, 3 W. C. L. J. 36; Enterprise Fence & Foundry Co. v. Majors, (Ind. App.), 121 N. E. 6, 3 W. C. L. J. 113; Kingan & Co., Limited v. Ossam, (Ind. App.), 121 N. E. 289, 3 W. C. L. J. 276; Lambert et al. v. Powers, —Ind. App.—, (1921), 131 N. E. 420.

27. Employers' Mutual Ins. et al. v. Indus. Comm. of Colo. et al., 65 Colo. 283, 176 Pac. 314, 3 W. C. L. J. 91, 18 N. C. C. A. 304; Snyder v. State Liab. Board of Awards, —Ohio—, 114 N. E. 268.

28. Carson-Payson Co. v. Industrial Comm. et al. 285 Ill. 635, 121 N. E. 264, 3 W. C. L. J. 234; Wabash Ry. Co. v. Industrial Commission et al. 286 Ill. 194, 121 N. E. 569, 3 W. C. L. J. 435.

No notice is required of the claim for a review under Section 19h of the Illinois Act, prior to the filing of a petition for that purpose within eighteen months after the agreement or award is made.[29]

Thus, where two bones in an employee's leg were broken, and upon representation by the employer and the insurance carrier that the employer did not come under the compensation act he accepted a lump-sum settlement, which settlement was filed with and approved by the board, it was held from all of the facts in the case that the employer was operating under the act, and in confirming the Board's action in reviewing the case and allowing additional compensation the court said: "Notwithstanding the fact that a lump-sum settlement had been made with Jefferson, the Industrial Board had authority * * *, to review its former proceedings. * * * From a consideration of the whole case, it clearly appears that Jefferson accepted this settlement for what he considered a temporary total disability. The evidence now shows that his disability is permanent. * * * The record fully justified the Industrial Board in finding that the disability has recurred and increased, and its decision should be confirmed."[30]

Under the Illinois act the statutory period of eighteen months runs from the date of entry of the award by the Industrial Commission regardless of an appeal from such award. Where it was contended that, while the case was on appeal to the Supreme court on writ of error, the award was vacated pending the decision of the Supreme Court, the court said: "The right of either party in compensation proceeding to file application for review of an award does not in any way depend upon whether or not the award, if an award has been made, is at the time of the filing of such application enforceable or is being held in obeyance by appeal or writ of error. * * * This period of time is

29. Arnold & Murdock Co. v. Ind. Board of Ill., 277 Ill. 295, 115 N. E. 137, 15 N. C. C. A. 383.

30. Ellsworth et al. v Industrial Commission et al., 290, Ill. 514, 125 N. E. 246, 5 W. C. L. J. 180.

eighteen months and extends from the time of the agreement or the award."[31]

Where the award had been commuted to a lump-sum payment after installments had been paid for some months, and such lump sum was not paid, but the employer asked for a review on the grounds that the disability had diminished since the award, a hearing was denied by the Board. The hearing was asked for within 18 months, and the court, referring the claim back for a rehearing said that, "Paragraph (h) is for the mutual advantage of both employer and employee and the same rule applied in favor of the employee must be applied in favor of the employer."[32]

Under the provisions of the Illinois Act, a voluntary lump-sum settlement entered into after the expiration of the time for filing a claim, confers jurisdiction on the Commission, and the Commission may review the settlement for the purpose of changing the award if the increased disability warrants.[33]

In proceedings to increase, diminish or terminate an award, "the board must consider the proof made on review as to whether the disability resulting from the injury had recurred, increased, diminished or ended, in connection with the proof made at the time the award was made."[34]

If the evidence tends to prove that the claimant is in the same condition as at the time of the prior hearing, it will not support an award for recurrence, nor can an award be entered under Sec. 18 Par. (h) Ill. Act because the exact extent of the injury was undiscovered at the first hearing.[35] And it was held to be

31. Big Muddy Coal & Iron Co. v. Industrial Comm. of Ill., 289 Ill. 513, 124 N. E. 564, 5 W. C. L. J. 24.

32. Peoria Ry. Co. v. Indus. Comm., 290 Ill. 177, 125 N. E. 1, 5 W. C. L. J. 194.

33. Tribune Co v. Ind. Comm., 290 Ill. 402, 125 N. E. 351, 5 W. C. L. J. 374.

34. Bloomington, D. & C. R. Co. v. Indus. Bd. of Ill., 276 Ill. 120, 114 N. E. 511, 15 N. C. C. A. 386.

35. Simpson Construction Co. v. Ind. Board, 275 Ill. 366, 114 N. E. 138, 15 N. C. C. A. 391.

error to take testimony as though it were an original hearing.[36] "He should only have been permitted to show the changes in his condition since the former hearing, on which was based the award of the arbitrators."[37] It has been held that on review the board should have an authenticated report of the evidence, or an agreed statement of the proven facts of the original hearing.[38]

In a case in which the proper procedure was followed for a rehearing for which the employer had petitioned, it was held that the finding of the Board was conclusive. In this case the original stenographic report was filed with the board and additional evidence was submitted to show the increase or recurrence of the injury.[39]

In a New Jersey case where an award was made upon the theory of a permanent total disability and upon information that the injured was again working at approximately the same wages after a period of less than two years disability, the court said: "When it appears in a case where an award has been made that the incapacity upon which the award was based had diminished or ceased, it becomes the duty of the court upon a proper application to interfere and grant relief."[40] But where the employee was unable to resume his old occupation, and the employer showed that the employee had on two occasions had employment for a few days at a time, such temporary employment, "would not be conclusive that his disability had ceased."[41]

36. City of Pana v. Ind. Bd. of Ill., 279 Ill. 279, 116 N. E. 647, 16 N. C. C. A. 813.

37. Casparis Stone Co. v. Industrial Board of Ill., 277 Ill. 333, 115 N. E. 822, 15 N. C. C. A. 390.

38. Illinois Midland Coal Co. v. Industrial Board of Ill. 277, Ill. 333, 115 N. E. 527; In re Bean, 227 Mass. 558, 116 N. E. 826, 16 N. C. C. A. 812; Western F. Co. v. Indus. Bd. —Ill.— 132 N. E. 218.

39. Squire-Dinger Co. v. Industrial Board of Ill., 117 N. E. 1031, 181 Ill. 359, 15 N. C. C. A. 400.

40. Safety Insulated Wire & Cable Co. v. Hudson County Court of Common Pleas, 90 N. J. L. 114, 100 Atl. 846, 15 N. C. C. A. 390.

41. Squire-Dinger Co. v. Industrial Bd. of Ill., 117 N. E. 1031, 181 Ill. 359, 15 N. C. C. A. 400.

Subsequent injuries which delay recovery from the original injury, but which were due to the original injury, will not be sufficient grounds for terminating payments under an award. In a Michigan case an employee suffered a fracture in each leg, and walked with crutches. He later fell twice and the fractures were very slow in knitting. The employer sought to terminate the payments because of the negligence of the employee. The court held that there was nothing negligent or wilful about the recurring of the injuries but they were due to mishaps because of the fact that he had to depend on crutches.[42]

Where the board refused to open a case upon one occasion and later opened it, the court said that, "The physical condition of a claimant might be such at one time that the application should be denied, whereas at a later time his condition might demand a review."[43] But where the claim was denied because of failure to claim compensation within the statutory limitation, the court has no power to reopen the case.[44]

Where there is newly discovered evidence the case may be reopened, as stated by the court in a Minnesota case: "If all that is claimed is true the injuries which resulted in the fracture of a limb, were misapprehended and not correctly described at the trial, and are more serious than disclosed. The evidence of this was discovered after the rendition of the judgment. We cannot say that there was an abuse of discretion in granting the order. Such application however, should be cautiously granted."[45]

In New York the act provides that, "the power and jurisdiction of the Commission over each case shall be continuing, and it may from time to time, make such modification or change with respect to former findings * * * as * * * may be

42. Cook v. Charles Hoertz & Son, 198 Mich. 129, 164 N. W. 464, 15 N. C. C. A. 400.

43. Shaffer v. D'Arcy Spring Co., 199 Mich. 537, 1 W. C. L. J. 418, 16 N. C. C. A. 748, 165 N. W. 825.

44. Benjamin & Johnes v. Brabban, 90 N. J. L. 355, 103 Atl. 688, 16 N. C. C. A. 749.

45. State ex rel. Klemmer v. District Court Rice Co., 134 Minn. 189, 158 N. W. 825, 16 N. C. C. A. 748.

just."[46] The courts of New York have repeatedly held that the commission has authority to reopen a claim and change the award,[47] even in the case of a lump sum award made final under Section 23.[48]

But where no new evidence is presented, and it is not claimed that the one seeking to reopen the case has any new evidence, the commission may refuse to reopen the award.[49]

The court said, in a New York case where the board had made an award: "If in the future the impairment of the claimant's vision should increase, the law gives the Industrial Commission the power to reconsider the award." [50]

There was no irregularity in the procedure where a case was heard upon its merits at the rehearing and further compensation granted. The employer was present and took part in the proceedings. He was not prejudiced by the fact that the notice of the hearing did not specifically state that the board, at the time of the hearing, might proceed to grant further compensation.[51]

In a case in which the commission annulled the award, the court in reinstating the award said: "The power to change an award is not an arbitrary one, but a judicial discretion, to be exercised only in the interest of justice. The award was a property right, which cannot be destroyed unless it definitely appears that, as a matter of justice, it should not stand. * * * If, in any event the award was not to stand, justice required a rehearing."[52] In the above case the award had been annulled on the strength of two medical opinions. Neither physician, however, having made

46. Workmen's Compensation Law, Sec. 74 (N. Y.).

47. Kriegbaum v. Buffalo Wire Works, 182 App. Div. 448, 169 N. Y. Supp. 307, 1 W. C. L. J. 861; Fish v. Rutland R. Co., 189 App. Div. 352, 178 N. Y. Supp. 439, 5 W. C. L. J. 98.

48. Metcalf v. Firth Carpet Co. et al., 188 N. Y. Supp. 448, (1921).

49. Schlenker v. Garford Truck Co., 183 N. Y. App. Div. 166, 170 N. Y. Supp. 439, 16 N. C. C. A. 749, 2 W. C. L. J. 374.

50. Boscarino v. Carfagno & Dragonette Inc., 220 N. Y. 323, Ann. Cas. 1918A 530, 115 N. E. 710, 16 N. C. C. A. 749.

51. Curtis v. Slater Const. Co., 194 Mich. 259, 160 N. W. 659, 16 N. C. C. A. 747.

52. Fischer v. Genesee Const. Co. et al., 187 N. Y. App. Div. 850, 176 N. Y. Supp. 86, 4 W. C. L. J. 279.

a physical examination of the claimant, the opinion being based on an assumed state of facts. And in another New York case the court discussed the proper procedure for changing an award: "The award made was in the nature of a judgment. It finally and conclusively determined the rights of the parties under the Workmen's Compensation Law. It could not be substantially changed, as proposed in this case, without notice to the parties interested and an opportunity given them to be heard. After such notice and opportunity, before a different method of payment could be fixed, the award previously made either had to be vacated or modified. * * *."[53]

An award under the Connecticut Compensation Act is a creation of statute, and is subject to modification as prescribed by statute, and there is nothing about it which has the finality of a judgment. A notice of hearing for the modification of an award should approximate an order of court in its definiteness and form and should bring the claim under some one or more of the statutory causes authorizing a modification. But if the record shows that the issues were fully heard and adjudicated, that the employer had his day in court and was not prejudiced, he cannot complain that the notice of hearing was not in proper form.[54]

The syllabus of a Nebraska case, written by the court, well states the holding in Nebraska: "Where an award of compensation has been made * * *, in favor of an injured employee, an application may be made to the court by either party, any time after six months from the date of the agreement or award, for a modification of the amount of the award on the ground of increase or decrease of incapacity due solely to the injury."[55]

Where the employee has recovered to such an extent that he is able to work, and engages in other employment, it is the duty of the board to reduce the compensation.[56] And where an employee refuses to submit to a medical examination to determine his con-

53. Sperduto v. New York City Interborough Ry. Co., 226 N. Y. 73, 123 N. E. 207, 4 W. C. L. J. 123.

55. Updike Grain Co. v. Swanson, 103 Neb. 872, 174 N. W. 862, 5 W. C. L. J. 289.

56. Moshinski v. Kay Salt Co., 206 Mich. 83, 172 N. W. 441, 4 W. C I. J. 229; Fennessey's Case,—Me.—, 113 Atl. 302, (1921).

dition, and there is evidence that he has recovered from his disability, payment of compensation should be suspended during the time he persists in refusing to submit to proper medical examination.[57]

In Kansas the statute gives the judge of the district court authority to reverse the case at any time before the final payment has been made. It has been held that where, on a proper petition for review, the evidence supported the claim of the injured that there was increased disability or the award was inadequate, the court having jurisdiction could correct the award and render judgment.[58] And the fact that an employer has paid the amount due at the time of the award will not estop him from questioning the correctness of the award as to future payments.[59]

An award will not be changed unless the board has statutory authority, and the one seeking to change the award presents evidence bringing the case within the statutory provisions. In an Indiana case, the court in refusing to reverse the action of the board, which had affirmed an award made upon agreement of the parties, said: "In making the agreement they confessed liability * * * apparently appellant and its insurance carrier were fully informed concerning every evidential fact, and from these facts they drew their own conclusion. * * * An agreement for compensation made in compliance with the statute and approved by the board, has the force and effect of an award. It would seem that an award resting on an agreement ought not to be set aside for the mere purpose of permitting an employer to try out the merits of his confession of liability."[60]

But where the agreement was the result of a mistake, the court, in a Michigan case, said: "But if the agreement of the parties, though made by mistake, is conclusive, compensation must still

57. Rose v. Desmond Charcoal & Chemical Co. et al., 206 Mich. 294 172 N. W. 415, 4 W. C. L. J. 238. See also Chapter XI. Medical Benefits.

58. Villalobos v. Cudahy Packing Co., (Kas.), 181 Pac. 619, 4 W. C. L J. 385.

59. Strong v. Sonken-Galamba Iron and Metal Co., —Kan.—, (1921), 198 Pac. 182.

60. Horne Packing & Ice Co. v. Cahill, — Ind. App.,—, 123 N. E. 415, 4 W. C. L. J. 184.

be paid at the agreed rate. We think it is not conclusive."[61] And where in the same state, the mistake was that of the board, it was corrected and the action held to be conclusive. An agreement signed by the injured and by the employer's insurance carrier was filed, and was erroneously approved by the board. Subsequently the board entered an order, stating that the agreement had not been approved. The claim was heard upon its merits and a proper award made. The court in affirming the board's action said: "There is evidence in the record to support the facts found by the board, and under the facts as found it would have been the duty of the board on application by plaintiff and notice to defendants to correct the so-called clerical errors in its records and set aside its erroneous order of approval even if entered by its direction. The board was not divested of jurisdiction in the matter by the unauthorized and inadvertent entries and notice."[62]

In Wisconsin, where an award had been made on the supposition that the only injury was the loss of the fingers of one hand, and a few days later the commission learned from the attending physician that there was a loss of the greater part of the metacarpal bones in addition to the fingers, the award was vacated without delay, and the proper notice of a rehearing was given to the parties in interest. The state supreme court in affirming the judgment of the lower court said: "We think that there was here a mistake within the meaning of the act. * * * The claimant, his attorneys, the commission, and in fact all parties to the proceeding supposed that the only injury was the loss of the fingers, and the award was made on that supposition, whereas in fact there was a loss of a part of the bones of the hand. Giving the law that breadth of construction which its remedial purpose calls for, it must be held that this was a mistake within the contemplation of the statute and hence that the award founded on it might properly be corrected."[63]

61. Kirchner v. Michigan Sugar Co. et al., 206 Mich. 459, 173 N. W. 193, 1 W. C. L. J. 402.

62. Wilcox v. Clarage Foundry & Mfg. Co. et al., 199 Mich. 79, 165 N. W. 925, 1 W. C. L. J. 627, 16 N. C. C. A. 751.

63. Jordon et al. v. Weinman et al., 167 Wis. 474, 167 N. W. 810, 16 N. C. C. A. 752, 2 W. C. L. J. 417.

When it is sought to change the award, the burden of proof is upon the one seeking to show the change of circumstances.[64] So where an employer seeks relief from further payments of compensation his claim is properly denied where there was evidence that although not fully recovered, the employee worked for a week receiving full wages, and then left and the employer failed to show what the earnings were thereafter.[65] Where the time has expired for a rehearing, under Section 20 (d) of the California Act the power to amend or alter awards is limited to cases were the application is based upon new facts arising since the making of the award. If there are no new facts, the commission has no juridiction to entertain a petition relieving an employer from liability.[66] Under the same act, where there has been a payment of compensation a claim may be made for further disability within 245 weeks. But it has been held that a claim under this provision must be made within six months after the "further disability" has become apparent.[67] Where a claimant sought to recover for "further disability" on the ground that the original injury caused the further disability, although he had made no claim within the statutory period, the court said: "If there have been no proceedings commenced within 6 months from the date of the injury, and if there has been no payment of disability indemnity or agreement therefor, the employee is not entitled to institute proceedings grounded upon 'further disability' after the expiration of 6 months from the date of the injury."[68]

64. Fischer v. W. F. Priebe & Co., 172 Ia. 512, 160 N. W. 48, 15 N. C. C. A. 397.

65. Nixon v. Furniture Mfgrs. Ass'n., — Mich. —, 179 N. W. 957, 6 W. C. L. J. 332; Fisher v. W F. Priebe & Co., 178 Ia. 512 160 N. W. 48, A 1 W. C. L. J. 586.

66. Northern Redwood Lumber Co. v. Ind. Acc. Comm. et al., (Cal.), 185 Pac. 991, 5 W. C. L. J. 354.

67. Employee's Credit Co. v. Ind. Acc. Comm., 177 Cal. 46, 169 Pac. 1001, 1 W. C. L. J. 467, 17 N. C. C. A. 169.

68. Kauffman v. Ind. Acc. Comm. of Cal., 37 Cal. App. 500, 174 Pac. 690, 17 N. C. C. A. 169, 2 W. C. L. J. 752.

The fact that an employee has been committed to jail is no ground for discontinuing compensation payments.[69] Though in an English Case it has been held to the contrary.[70]

The provision of the Kansas Workmen's Compensation Act (Laws 1911, c. 218, sec. 29) authorizing an award to be set aside because of being grossly inadequate or grossly excessive refers to the amount fixed by arbitration and has no application to a contract releasing the employer from further liability.[71]

After the time for review in the Supreme Court has lapsed a judgment is not amendable by the circuit court for judicial error, since the statute authorizing a modification of a judgment on the ground of "increase or decrease of incapacity" does not authorize a modification because of a judicial error in determining the amount of the award.[72]

Although fraud is a ground for setting aside a release, fraud need not be shown as a prerequisite to reopening the case, but some equitable grounds must be shown, and a showing of further disability from the injury is sufficient grounds for a reopening by the commissioner, and he is not required to refer the case to the board for determination.[73]

The evidence at a prior hearing is necessary to the determination of the right to increase compensation, but the proceeding for increased compensation because of changed conditions, not being a new case, but a continuation of the original proceeding, the evidence need not be reintroduced.[74]

Where an award was made for a supposedly trivial injury and it subsequently developed into a serious condition, a petition for review filed more than one year after the last payment.

69. Hanlon v. Employer's Liab. Assur. Corp., 2 Mass. Ind. Acc. Bd. 716, Bull. No. 11 Minn. Dept. of Labor, 40.

70. Clayton and Shuttleworth v. Dobbs, (1908), 2 B. W. C. C. 488.

71. Odrowski v. Swift & Co., — Kan. —, 162 Pac. 268, A 1 W. C. L. J. 643.

72. Connelly v. Carnegie Dock & Fuel Co., — Minn. —, (1921), 181 N. W. 857.

73. Vodopich v. Trojan Mining Co., — S. D. —, (1921), 180 N. W. 965.

74. Indianapolis Bleaching Co. v. Morgan, — Ind. App. —, (1921), 129 N. E. 644.

was not too late under the Pennsylvania Workmen's Compensation Law, Section 315; for the provision thereof that, where payments of compensation have been made in any case, said limitations, shall not take effect until one year from the date of the last payment, refers to cases previously specified in the section, and operates, as to them, as an extension rather than further limitation of the time for making claim.[75]

Where the extent of disability cannot be determined the case should be continued until such time as a final determination would be possible.[76]

A petition for lump-sum award concluding with a prayer for general relief is sufficient to authorize a change by the court in the amount of compensation awarded, by increasing the amount and decreasing the number of weeks, allowing a discount in favor of the employer.[77]

§ 553. **Rehearing.**—The general rule on the subject of rehearing is well stated in an Indiana case in which the court said: "While holding that the Industrial Board has the power in case of fraud, duress, or mistake to vacate its approval of a compensation agreement and to entertain an application for that purpose, such application should be scrutinized closely and cautiously granted. It is important that a case under the Workmen's Compensation Act solemnly adjudicated should not be reopened for the purpose of allowng a party to make a new and distinct case. Benjamin v. Brabban, 90 N. J. Law, 355, 103 Atl. 688. It is not the policy of such statutes that there be retrials for error as in an ordinary action. Upon the hearing an award is entered, which for all practical purposes has the effect of the award of an arbitrator under the common law."[78]

75. Hughes v. Amer. Inter. Shipbuilding Corp., — Pa. —, (1921), 112 Atl. 433.

76. Arcangelo v. Gallo. & Lagindara, — N. Y. App. Div. —, 163 N. Y. S. 727, B 1 W. C. L. J. 1263.

77. Western Indus. Co. v. Milan, — Tex. Civ. App. —, (1921), 230 S. W. 825.

78. Frankfort Gen. Ins. Co. v. Conduitt, — Ind. App. —, (1920), 127 N. E. 212, 6 W. C. L. J. 25.

The fact that the personnel of the board had changed during the course of the hearing was not grounds for a rehearing where a quorum of the board was present at all times.[79] Nor is a rehearing granted as a matter of right, upon any question of fact, "ordinarily, where there has been a full hearing there should be no retrial, but a final decree be entered."[80] In a case in which the Board proceeded upon erroneous principals of law in permitting proof of dependence the court said: "The widow ought to be allowed, if she desires, to introduce further evidence at a new hearing. If she does introduce further evidence, the insurer must have the same privilege, and the case be considered anew upon this point."[81] Where a full trial has been given, and the decree reversed because the evidence did not support the finding, a rehearing should be given on the testimony already heard and not on new testimony. And compensation should be awarded in conformity with the value of the evidence.[82]

Where a clerk misdirected a copy of an award and it was not received until after the time for appeal for review, the board was directed by the court to permit the appeal to be perfected, inasmuch as the fault, if any, was with the board, the court said: "It is a rule of general application, that where a party in the prosecution of a right does everything which the law requires of him to do, and he fails to attain his right, wholly by the neglect or misconduct of an officer charged with a public duty with respect thereto the law will protect him."[83]

Where a rehearing is sought the applicant must comply with the statutory limitations or lose the right to a rehearing. In Colorado an employee was injured in May, 1916, and received compensation until January 5th, 1917. In February the case was reopened by the Commission and a further

79. Vogely v. Detroit Lumber Co., 196 Mich. 516, 162 N. W. 975, 16 N. C. C. A. 809.

80. In re Borski, 227 Mass. 456, 116 N. E. 811, 16 N. C. C. A. 809; Devine's Case, — Mass. —, (1921), 129 N. E. 415.

81. In re Derinza, 229 Mass. 435, 118 N. E. 942, 16 N. C. C. A. 210.

82. Morin v. Nashua Mfg. Co., 78 N. H. 567, 103 Atl. 312, 16 N. C. C. A. 816; In re Lacione, 227 Mass. 269, 116 N. E. 485, 16 N. C. C. A. 809.

83. In re Ale et al., 64 Ind. App. —, 117 N. E. 938, 1 W. C. L. J. 585.

hearing held. Upon petition of the employee a rehearing was granted in June. At this last hearing all of the old evidence and much new evidence was before the commission, and full consideration was given to all of the issues. The court held that the last hearing was, in effect, a new trial of the issues, and quoting the provision of the act said: "No action * * * to set aside * * * any finding, order or award of the commission, * * * shall be brought unless the plaintiff shall have first applied to the commission for a rehearing thereon as provided in this act.' The purpose of the act is to confine the settlement of compensation cases to the commission itself, so far as is consistent with justice. It is clear that the legislative intent was that the commission should be given an opportunity to review its own findings, before permitting claimants, or other dissatisfied persons, to resort to the courts, * * * claimant failed to * * * petition for a rehearing before he appealed to the district court, and for this reason the appeal was incompetent and futile."[84]

In Michigan a hearing was had before a committee of arbitration and the employee's claim was denied. A provision of the act requires the filing of a claim for review within seven days. This the employee failed to do. The court said: "After a committee on arbitration had passed upon his claim for compensation, and filed its decision with the Industrial Board, it was final and stood as the decision of the board, unless, within the seven days thereafter given by the act he * * * filed a claim for review, except * * * upon a legal showing that the delay was without fault imputable to him or his attorney, and excused by circumstances beyond his control. * * * In the absence of such showing justifying the delay, the board had no arbitrary power to act in the matter, and the 7 days limit fixed by the statute is conclusive. The showing must be such as presents some legal basis recognized as authorizing the exercise of a judicial or quasi judicial function, or judgment in administration of the law."[85]

84. Passini v. Indus. Comm. of Colorado et al., 64 Col. 349, 171 Pac. 369, 1 W. C. L. J. 927.

85. Kalucki v. American Car & Foundry Co., (Mich.), 166 N. W. 1011. 1 W. C. L. J. 989.

It was further held that since a claim for review could be made by a simple written statement, the fact that the claimant had no money with which to pay for a formal claim was not sufficient cause for extending the time.

And where the commission had reviewed the arbitration award and denied a rehearing the court said: "There is no provision in the law for a rehearing after a final order is made by the board."[86]

That a notice for rehearing was not in proper form will not be considered where the record shows that the employer had his day in court and was not prejudiced thereby.[87]

The two methods of review of decisions of the Industrial Board, provided by the Illinois Compensation Act are exclusive and upon an application to the circuit court for a judgment upon the award of the board the circuit court cannot inquire into the legality of the board's action.[88]

In Massachusetts the Supreme Judicial Court has the power to send a case back for further hearing when justice seems to require it.[89]

The court in reviewing the Industrial Board's action in vacating the award of the board and resetting the matter for another arbitration, because the notes taken by the stenographer at the first hearng had been destroyed said: "We know of no rule of law or of practice which requires a party to furnish his adversary with a transcript of testimony taken by his own stenographer. While the board or any member thereof may make examinations of the books and papers of the parties to a dispute (section 5456, C. L. 1915) this does not entitle a party to a transcript obtained at the expense of the other party. As a matter of courtesy between attorneys it is frequently furnished, and in the instant case the attorneys for the insurance company

86. Pocs v. Buick Motor Co. et al., (Mich.), 175 N. W. 125, 5 W. C. L. J. 278.

87. Saddlemire v. American Bridge Co., — Conn. —, 110 Atl. 63, 6 W. C. L. J. 130.

88. Bernstein v. Brotham, — Ill. —, 114 N. E. 120, A 1 W. C. L. J. 327.

89. Devine's Case, — Mass. —, (1921), 129 N. E. 414; Chrisholm's Case, — Mass. —, (1921), 131 N. E. 161.

apparently made a good-faith effort to obtain it for the applicant. The notes, however, had been destroyed and it was therefore impossible to produce it. This fact might induce the board to consider fully all testimony taken under the provisions of section 5464, C. L. 1915, but it did not authorize the action taken."[90]

A second petition for a rehearing is unnecessary before bringing an action in the district court to review the proceedings of the Colorado Commission.[91]

Where an employee in destitute circumstances signed a release for a sum less than a valid award, the Industrial Commission properly refused to reopen the case and receive the paper in evidence for the release was invalid.[92]

§ 554. **Findings.**—Where there is a dispute, and the matter is before the court or commission, it is the duty of the court or commission to determine every factor at issue.[93] The commission or court should in every hearing make findings of fact, otherwise upon appeal the court would not find it possible to, "review the decree intelligently and to determine whether the decree should be affirmed, reversed or modified, * * *."[94]. Where no finding of fact are made the court upon appeal is not bound to make the findings as a matter of law.[95] Where the commission has not made findings, the case may be recommitted for findings.[96] And where under the act an arbitration com-

90. Jones v. St. Joseph Iron Works, — Mich. —, (1920), 180 N. W. 374, 7 W. C. L. J. 315.

91. Carroll v. Indus. Comm., — Colo. —, (1921), 195 Pac. 1097.

92. Jenkins v. T. Hogan & Sons, — N. Y. App. Div. —, 163 N. Y. S. 707, 8 1 W. C. L. J. 1348.

93. D. V. G. Mfg. Co. v. Sorrentino, 91 N. J. L. 558, 103 Atl. 190, 1 W. C. L. J. 1099, 16 N. C. C. A. 753.

94. Dodge v. Barstow Stove Co., 40 R. I. 191, 100 Atl. 245, 16 N. C. C. A. 754.

95. In re Ripley, 229 Mass. 302, 118 N. E. 638, 1 W. C. L. J. 622, 16 N. C. C. A. 754.

96. Reilly v. Erie Ry. Co., 264, Pa. 329, 107 Atl. 736, 4 W. C. L. J. 639; McCarthy's Case, 230 Mass. 429, 119 N. E. 697, 2 W. C. L. J. 283, 16 N. C. C. A. 755; Hallet's Case, 230 Mass. 326, 119 N. E. 673, 2 W. C. L. J. 281, 16 N. C. C. A. 755.

mittee was appointed but failed to agree, the board had the authority to refer the matter back to the committe for findings.[97] "The referee should make his findings of fact so comprehensive and explicit as to disclose the full story of the accident."[98]

But it is not necessary that they should be formal, "the mere fact that each finding of the referee is not formally labeled by him as a finding of fact or conclusion of law in no way changes their actual character."[99] The Industrial Commission should not incorporate the written opinion as part of the findings, as the opinion is, as a general rule, more or less general. But where the opinion is incorporated as a part of the findings the court reviewing the case must consider the opinion to ascertain the facts.[1] The courts have uniformly held that upon questions of fact the findings of the commission are conclusive upon the courts on appeal.[2] The award is conclusive upon all matters of

97. Kerens-Donnewald Coal Co. v. Indus. Board of Ill., 277 Ill. 35, 115 N. E. 225, 16 N. C. C. A. 815.

98. Gurski v. Susquehanna Coal Co., 262 Pa. 1, 104 Atl. 801, 3 W. C. L. J. 73; Flucker v. Carnegie Steel Co., 263 Penn. 113, 106 Atl. 192, 3 W. C. L. J. 780.

99. Dainty v. Jones & Laughlin Steel Co., 263 Pa. 109, 106 Atl. 194, 3 W. C. L. J. 784.

1. Torchitsky v. Gotham Folding Box Co., — N. Y. App. —, 128 N. E. 500, 7 W. C. L. J. 218.

2. Anderson v. Kiene, 103 Neb. 773, 174 N. W. 301, 4 W. C. L. J. 722; Suburban Ice Co. v. Indus. Board of Ill., 294 Ill. 630, 113 N. E. 979, 14 N. C. C. A. 132; Nelson v. Kentucky River Stone & Sand Co., 182 Ky. 317, 206 S. W. 473, 18 N. C. C. A. 309; Pekin Cooperage Co. v. Industrial Comm. et al., 285 Ill. 31, 120 N. E. 530, 3 W. C. L. J. 26; Ellsworth et al. v. Industrial Comm. et al., 290 Ill. 514, 125 N. E. 246, 5 W. C. L. J. 180; Indianapolis Light & Heat Co. v. Fitzwater, — Ind. App. —, 121 N. E. 126, 18 N. C. C. A. 293; Kanscheit v. Garrett Laundry Co., 101 Neb. 702, 164 N. W. 708, 18 N. C. C. A. 295; Curtis v. Slater Const. Co., 202 Mich. 673, 168 N. W. 958, 18 N. C. C. A. 293; Hollenbach v. Hollenbach, 181 Ky. 262, 204 S. W. 152, 16 N. N. C. A. 879, 2 W. C. L. J. 492; Kroog v. Keystone Dairy Co., 92 N. J. L. 633, 106 Atl. 28, 3 W. C. L. J. 777; Board Comm. Cleveland County v. Barr, (Okl.), 173 Pac. 206, 2 W. C. L. J. 548, 18 N. C. C. A. 307; Mississippi River Power Co. v. Indus. Comm. et al., 289 Ill. 353, 124 N. E. 552, 5 W. C. L. J. 50; Swing v. Kokomo Steel & Wire Co., — Ind. —, 125 N. E. 471, 5 W. C. L. J. 380;

fact properly in dispute before the commission, where supported by evidence, or reasonable inference to be drawn therefrom.[3]

Chicago-Sandoval Coal Co. v. Indus. Comm., — Ill. —, (1920), 128 N. E. 567, 7 W. C. L. J. 34; American Smelting & Refining Co. v. Cassil, — Neb. —, (1920), 178 N. W. 639, 6 W. C. L. J. 467; Insana v. Nordenholt Corporation, 183 N. Y. S. 83, (1920), 6 W. C. L. J. 479; Sciolas' Case, — Mass. —, (1920), 128 N. E. 666, 7 W. C. L. J. 72; Jakutis' Case, — Mass. —, 130 N. E. 637 (1921); Twin Peaks Canning Co. v. Indus. Comm., — Utah —, (1921), 196 Pac. 853; State Indus. Comm. v. Tassell & Fairbanks, 184 N. Y. S. 426, (1920), 7 W. C. L. J. 104; McDonaugh v. Indus. Comm., — Cal. App. Pac. 1034, A 1 W. C. L. J. 238: Decatur Ry. Light & Power Co. v. Indus. Bd., — Ill. —, 114 N. E. 915, A 1 W. C. L. J. 373; American Leather Product Co. v. Stone, — Ind. App. —, (1920), 129 N. E. 264, 7 W. C. L. J. 289; McDonalds' Case, — Me. —, 113 Atl. 179 (1921); Jones v. Industrial Acc. Comm., —Cal. App.— 200 Pac. 50; G. L. Eastman Co. v. Indus. Acc. Comm. —Cal.— 200 Pac. 17; Simon v. H. Cathroe Co., — Neb.—, 184 N. W. 130.

3. Passini v. Industrial Commission of Colo., 64 Colo. 349, 171 Pac. 369, 1 W. C. L. J. 927, 18 N. C. C. A. 293; Lundy v. Geo. Brown & Co., (N. J.), 108 Atl. 252, 5 W. C. L. J. 294; Mayeur v. J. R. Crowe Coal & Mining Co., —Kan. —, 186 Pac. 1035, 5 W. C. L. J. 526; Berquist v. Dist. Ct. of Beltrami Co., — Minn. —, 176 N. W. 165, 5 W. C. L. J. 549; Keller v. Ind. Comm., — Ill. —, 126 N. E. 162, 5 W. C. L. J. 665; E. Weiner Co. v. Ind. Comm., — Wis. —, 176 N. W. 781, 5 W. C. L. J. 756; Sunnyside Coal Co. v. Ind. Comm., — Ill. —, 126 N. E. 196, 5 W. C. L. J. 679; Kuca v. Lehigh Valley Coal Co., 110 Atl. 731, 6 W. C. L. J. 499, (1920); Morris v. Yough Coal & Supply Co., — Pa. —, (1920), 109 Atl. 914, 6 W. C. L. J. 210; N. Pac. S. S. Co. v. Indus. Comm., — Cal. —, 163 Pac. 910, A 1 W. C. L. J. 170; Richmond Dredging Co. v. Indus. Comm., 33 Cal. App. 97, 164 Pac. 407, A 1 W. C. L. J. 230; Easton v. Indus. Comm., — Cal. App. —, 167 Pac. 288; Meehan v. Edward Valve & Mfg. Co., — Ind. App. —, 117 N. E. 265, A 1 W. C. L. J. 508; In re McCaskey, — Ind. App. —, 117 N. E. 268, A 1 W. C. L. J. 511; Bloomington Bedford Stone Co. v. Phillips, — Ind. App. —, 116 N. E. 850, A 1 W. C. L. J. 558; Interstate Iron Co. v. Szot, — Ind. App. —, 115 N. E. 599, A 1 W. C. L. J. 571; Waterman v. Riehl, — Ind. App. —, 117 N. E. 272, A 1 W. C. L. J. 579; Daich v. Studebaker Corp., 195 Mich. 482, 161 N. W. 927, A 1 W. C. L. J. 896; Miller v. Acme Lead Works, — Mich. —, 164 N. W. 432, A 1 W. C. L. J. 978; Oniji v. Studebaker Corp., 196 Mich. 397, 163 N. W. 23, A 1 W. C. L. J. 984; State ex rel. Adriatic Mining Co. v. District Court of St. L. County, — Minn. —, 163 N. W. 755, A 1 W. C. L. J. 1043; Western Indemnity Co. v. Industrial Accident Commission, — Cal. —, (1920), 109 Pac. 27, 6 W. C. J. J. 256; Hafer Washed Coal Co. v.

"When the Industrial Board acts within its powers, its findings upon the facts are conclusive."[4] In the trial before the court of original jurisdiction in Kansas the determination by the jury of a disputed question is conclusive on appeal.[5] "It is * * * established law that the findings of the Industrial Board have the same force as the finding of a court or a verdict of the jury, and are not to be set aside if there is any evidence upon which they can rest."[6]

Indus. Comm., — Ill. —, (1920), 127 N. E. 754, 6 W. C. L. J. 293; Henry Pratt Co. v. Indus. Comm., — Ill. —, (1920), 127 N. E. 754, 6 W. C. L. J. 296; Steele Sales Corp. v. Indus. Comm., — Ill. —, (1920), 127 N. E. 698, 6 W. C. L. J. 303; State ex rel. Kile v. District Court, — Minn. —, (1920), 177 N. W. 934, 6 W. C. L. J. 344; Cudahy Packing Co. v. Zafiropoulos, — Ind. App. —, (1920), 129 N. E. 32, 7 W. C. L. J. 196; Kramer v. Huntington Steel Foundry Co., — Ind. App. —, (1920), 127 N. E. 284, 6 W. C. L. J. 154; Alexander Box Co. v. Cutshall, — Ind. App. —, (1920), 127 N. E. 286, 6 W. C. L. J. 155; Choctaw Portland Cement Co. v. Lamb, — Okla. —, (1920), 189 Pac. 750, 6 W. C. L. J. 207; MacDonald v. Employers' Liab. Assur. Corp., — Me. —, (1921), 112 Atl. 719; Doscolos v. Indus. Comm., — Utah —, (1921), 195 Pac. 638; Stafford's Case, — Mass. —, (1921), 130 N. E. 109; Buckley v. Inland Steel Co., — Ind. App. —, (1921), 129 N. E. 860; Standard Coal Co. v. Gallagher, — Ind. App. —, (1921), 129 N. E. 482; Divine's Case, — Mass. —, (1921), 129 N. E. 414; Christensen v. Protector Sales Co., — Neb. —, (1920), 181 N. W. 146; Gray v. St. Croix Paper Co., — Me. —, (1921), 113 Atl. 32; Gauthier v. Penobscot Chemical Fiber Co., — Me. —, (1921), 113 Atl. 28; Tolan v. Phil. & Reading Coal and Iron Co., — Pa. —, (1921), 113 Atl. 67; Mullen v. Mitchell, — Okla. —, (1921), 197 Pac. 171; Kelley's Dependents v. Hoosac Lbr. Co., — Vt. —, (1921), 113 Atl. 318.

4. Illinois Midland Coal Co. v. Indus. Board of Ill., 227 Ill. 333, 115 N. E. 527, 14 N. C. C. A. 126; Wanda v. Jamestown Brewing Co. et al., — N. Y. —, 180 N. Y. S. 694, 5 W. C. L. J. 735; Brenner v. Heruben et al., (Wis.), 176 N. W. 228, 5 W. C. L. J. 639; Morris & Co. v. Indus. Comm., — Ill. —, (1920), 128 N. E. 727, 7 W. C. L. J. 41.

5. McCorkle v. Red Star Mill & Elevator Co., 99 Kan. 131, 160 Pac. 983, 14 N. C. C. A. 127; McDonald v. Great Atlantic & Pacific Tea Co., — Conn. —, (1920), 11 Atl. 65, 6 W. C. L. J. 525; St. Clair v. A. H. Meyer Music House, — Mich. —, (1920), 178 N. W. 705, 5 W. C. L. J. 540; Finkleday v. Henry Heide, Inc., 183 N. Y. S. 912, 6 W. C. L. J. 565.

6. Sugar Valley Coal Co. v. Drake, 64 Ind. App. —, 117 N. E. 937, 18 N. C. C. A. 294; Globe Indemnity Co. v. Ind. Comm., — Cal. —, 187 Pac. 452, 5 W. C. L. J. 486; Miller v. Diamond Ice & Coal Co., — Del. —,

"We have repeatedly held that in the absence of fraud this court is bound by the decision of the Industrial Board upon all questions of fact."[7] Nor will the Ohio Supreme Court weigh evidence in compensation cases determined by the Court of Appeals.[8] But the findings of fact not supported by any evidence are not binding on the court.[9]

In reviewing a finding on the question of dependency the court will examine the evidence to determine whether there was any

(1920), 111 Atl. 745, 7 W. C. L. J. 185; Rudnick v. White Bros., — Del. —, (1920), 109 Atl. 881, 6 W. C. L. J. 138; In re Simmons, — Me —, 103 Atl. 68, 1 W. C. L. J. 984.

7. Big Muddy Coal & Iron Co. v. Industrial Bd. of Ill., 279 Ill. 235, 124 N. E. 564, 5 W. C. L. J. 24, 18 N. C. C. A. 301; Brown v. Bouschor, (Mich.), 175 N. W. 129, 5 W. C. L. J. 260; Miller v. Bell, — Ind. App. —, (1920), 127 N. E. 567, 6 W. C. L. J. 315; Employers Mutual Ins. Co. v. Morgulski, — Colo. —, (1920), 193 Pac. 725, 7 W. C. L. J. 183; Vulcan Detinning Co. v. Indus. Comm., — Ill. —, (1920), 128 N. E. 917, 7 W. C. L. J. 191; Ferri v. Lenni Quarry Co., — Pa. —, (1920), 109 Atl. 845, 6 W. C. L. J. 98; Amalgamated Sugar Co. v. Indus. Comm. of Utah, — Utah —, (1920), 189 Pac. 69, 6 W. C. L. J. 112; Indus. Comm. v. Evans, 174 Pac. 825; Murray City v. Indus. Comm., —Utah— 183 Pac. 331, 4 W. C. L. J. 647.

8. State v. Derrer, — Ohio —, (1921), 130 N. E. 557; Derr v. Kirkpatrick — Neb. — 184 N. W. 91.

9. Scheer v.Holmes, — Mich. —, 164 N. W. 423, A 1 W. C. L. J. 1006; Southern Pac. Co. v. Ind. Acc. Comm. et al., 177 Cal. 378, 170 Pac. 822, 1 W. C. L. J. 741; Wisconsin Steel Co. v. Indus. Comm. et al., 288 Ill. 206, 123 N. E. 295, 4 W. C. L. J. 168; Herbert v. Lake Shore & M. S. Ry. Co., 200 Mich. 566, 166 N. W. 923, 1 W. C. L. J. 1069; Elk Grove Union High School Dist. v. Ind. Acc. Comm. of State of Cal., 168 Pac. 392, 34 Cal. App. 589, 1 W. C. L. J. 143; Albaugh-Dover Co. v. Ind. Bd. of Ill., 278 Ill. 179, 115 N. E. 834, 14 N. C. C. A. 131; Lezala v. Ind. Comm., — Wis. —, 175 N. W. 87, 5 W. C. L. J. 338; Centlivre Beverage Co. v. Ross, — Ind. —, 125 N. E. 220, 5 W. C. L. J. 212; Saunders v. New England Collapsible Tube Co., — Conn. —, (1920), 110 Atl. 538, 6 W. C. L. J. 271; Board of Comm. of Greene County v. Shertzer, — Ind. App. —, 127 N. E. 843, 6 W. C. L. J. 310; Hogan's Case, — Mass. —, (1920), 127 N. E. 892, 6 W. C. L. J. 321; Blozina v. Castile Mining Co., 178 N. W. 57, — Mich. —, (1920), 6 W. C. L. J. 327; Decatur Court Co. v. Indus. Comm., — Ill. —, (1921), 129 N. E. 738; Clapp's Parking Station v. Indus. Comm., — Cal. —, (1921), 197 Pac. 369; Shaws Dependents v. Fred C. Harms Piano Co., — S. Dak. —, 184 N. W. 130.

substantial competent evidence to warrant such a finding, and if none is found the award will be annulled under the rule that, where there is no conflict in the evidence and no conflicting inferences may be drawn therefrom, the question whether the finding is supported by the evidence is one of law.[10]

A finding that it was the custom and practice that the employer was covered by insurance from the date of his application was not supported by evidence which showed that the terms of the application were not unconditionally accepted by the company.[11]

"The courts may not interfere with the findings of fact, made by the Industrial Commissioner, when these are supported by evidence, even though it may be thought there be error."[12] "The rule * * * is well settled to the effect that, if in any reasonble view of the evidence it will support, either directly or indirectly, or by fair inference, the findings made by the commission, then they must be regarded as conclusive."[13] Courts cannot demand the same precision in the finding of commissions as otherwise might be if the members were required to be learned in the law.[14]

It is equally well settled that findings of law by the commission

10. Globe Grain & Milling Co. v. Indus. Comm., — Utah —, (1920), 193 Pac. 642, 7 W. C. L. J. 245; Ogden City v. Indus. Comm., — Utah —, (1920), 193 Pac. 857, 7 W. C. L. J. 249; Poccardi v. State Comp. Comm'r., — W. Va. —, 91 S. E. 663, B 1 W. C. L. J. 1650; Atwood v. Conn. Light & Power Co., — Conn. —, (1921), 112 Atl. 269; Moore Shipbuilding Corp. v. Indus. Comm., — Cal. —, (1921), 196 Pac. 257; Richardson Sand Co. v. Indus. Comm., — Ill. —, (1921), 129 N. E. 751; Fournier's Case, — Me. —, (1921), 113 Atl. 127.

11. Western Indemnity Co. v. Indus. Acc. Comm., — Cal. —, 109 Pac. 27, 6 W. C. L. J. 256.

12. Pace v. Appanoose County, 184 Iowa 498, 2 W. C. L. J. 884, 17 N. C. C. A. 682, 168 N. W. 916; Pawling & Harnischfeger Co. et al. v. Wildenberger et al., — Wis. —, 174 N. W. 455, 5 W. C. L. J. 121.

13. Wausan Lumber Co. v. Indus. Comm., et al., 166 Wis. 204, 164 N. W. 836, 1 W. C. L. J. 142; Ind. Comm. v. H. Koppers Co., — Colo. —, 185 Pac. 267, 5 W. C. L. J. 158; Reteuna v. Ind. Comm., — Utah —, 185 Pac. 535, 5 W. C. L. J. 327; Krobitzsch v. Ind. Acc. Comm., — Cal. —, 185, Pac. 396, 5 W. C. L. J. 136; Booth & Flinn v. Cook, — Okla. —, (1920), 193 Pac. 36, 7 W. C. L. J. 144.

14. Whittle v. National Anilline and Chemical Co., — Pa. —, 109 Atl. 847.

or board are not binding upon the court;[15] in fact several of the acts specifically provide that only findings of law may be reviewed on appeal to the courts. Under the 1921 amendment to the Illinois Act section 19 Par. (1) both questions of law and fact may be reviewed by certiorari.

In a Washington case the court said: "In so far as the commission has adopted any rules that pertain to the administrative features or those matters that are peculiarly within the control of the commision, the courts, we apprehend, will recognize its right to do so. But this does not mean that in our interpretation of the true intent and purposes of the act on a pure question of law we are bound by any ruling of the commission. If so, there would be no purpose in the appeal to the courts provided by the act. Whenever the Industrial Insurance Commission interprets the law, that interpretation is reviewable in the courts, and while in any given case, as in this, the courts will give due respect to the rulings of the commission, they must finally act upon their own determination as to what the law means and the extent to which it is applicable."[16] "The Workmen's Compensation Act does not make the Board's legal conclusion binding upon this court. If it is clear upon the facts that as a legal conclusion an injury was not accidental or that it did not arise in the course of the employment, a contrary conclusion awarding compensation will not be allowed to stand."[17]

Where there "was no hearing de novo by the board the case rests upon the facts found by the referee, citing McCauley v. Imperial W. Co. et al., 261 Pa. 312, 104 Atl. 617."[18]

15. Hulley v. Moosbrugger, 88 N. J. Law, 161, 95 Atl. 1007, L. R. A. 1916C 1203; Thibeault's Case, — Me. —, (1920), 111 Atl. 491, 7 W. C. L. J. 65; Kuca v. Lehigh Valley Coal Co., — Pa. —, (1920), 110 Atl. 731 6 W. C. L. J. 499; State ex rel. Kile v. District Court, — Minn. —, (1920), 177 N. W. 934, 6 W. C. L. J. 344; McDonald v. Employers' Liab. Assur. Corp., — Me. —, (1921), 112 Atl. 719; T. J. Forschner & Co. v. Indus. Bd., 278 Ill. 99, 115 N. E. 912, A 1 W. C. L. J. 387.

16. Zaffala v. Industrial Comm., 82 Wash. 314, 144 Pac. 54, L. R. A. 1916A, 295.

17. Eugene Dietzen Co. v. Ind. Bd. 279, Ill. 11, 116 N. E. 684 14 N. C. C. A. 125, See section 19 Illinois Act. amendment of 1921.

18. Keyes v. N. Y. O. W. Ry. Co., — Pa. —, 108 Atl. 406, 5 W. C. L. J. 464.

Unless under the Texas Act action be taken to set aside the final ruling of the board, its decree is final as to all issues both of law and fact.[19]

Where the finding of the Board on the question of fact was supported by evidence it was held to be error for the lower court to set aside the Board's decision.[20]

In Iowa it was held that the court had the right to review the commissioner's finding of fact on the jurisdictional question of whether or not the relation of employee and employer existed.[21]

Under the Massachusetts Act the commission having the power to review and reverse the findings and decision of a member, may do so even though such finding have support in the evidence.[22] And findings based on evidence not reported, are held not unwarranted.[23]

Claimants having established partial dependency, an award based upon the average weekly wage was not invalid because the commission failed to determine the daily wage especially where under the evidence the only finding that could have been made would justify the award, therefore the appellants were not prejudiced by the omission.[24]

When the industrial commission makes an alternative finding it must eliminate the contingency that the employee was injured by an act which would bring him without the scope of his employment where the alternative finding leaves it possible to so find.[25]

The Illinois Supreme Court makes the following suggestion to the Industrial Commission: "As a matter of good practice, we think it would be better if the Industrial Commission would find specifi-

19. Southern Surety Co. v. Lucero, — Tex. —, 218 S. W. 68, 5 W. C. L. J. 608.

20. Ellsworth v. Ind. Comm., — Ill. —, 125 N. E. 246, 5 W. C. L. J. 180.

21. Bidwell Coal Co. v. Davidson, — Iowa, —, 174 N. W. 592, 5 W. C. L. J. 71.

22. Sonia's Case, — Mass. —, 125 N. E. 574, 5 W. C. L. J. 401.

23. Chisholm's Case, — Mass. —, (1921), 131 N. E. 161.

24. Geo. A. Lowe v. Indus. Comm., — Utah, —, (1920), 190 Pac. 934, 6 W. C. L. J. 511.

25. Greenberg v. Greenberg, — App. Div. —, (1920), 185 N. Y. S. 258, 7 W. C. L. J. 230.

cally the nature and effect of the injury for which an award is made, rather than a finding simply that an award is made of a certain amount for a certain period under a certain provision of the statute. While we are of opinion the objection that the findings in the award are insufficient to support it would not require a reversal of the judgment, the particular paragraphs of the section under which the award was made being referred to in the finding, we would be better satisfied if the findings stated in express terms whether the injury produced partial or total, permanent or temporary disability or disfigurement."[26]

"In an action under the Kansas Workmen's Compensation Act, the jury returned an affirmative answer to the question whether the plaintiff was at the time of the trial totally incapacitated from performing labor, and a negative answer to the question whether he was at that time partially incapacitated. It was held that in accordance with the rule that special findings must be given such reasonable construction as will harmonize them with each other and with the general verdict, the latter answer should be interpreted to mean that the plaintiff was not partially incapacitated because he was still totally incapacitated."[27]

An expression of belief by a commissioner has no place in the findings and must not be considered on review.[28]

A commissioner should include all of the injuries in an award, but where there is an injury whose extent or prognosis cannot be determined, it need not be included in an award for other injuries.[29]

To warrant a recovery under the New Jersey Act the findings must show in written determination of the trial judge that the

26. Jackson Coal Co. v. Indus. Comm., — Ill. —, (1920), 128 N. E. 813, 7 W. C. L. J. 188; Jackson Coal Co. v. Indus. Comm., — Ill. —, (1920), 128 N. E. 815, 7 W. C. L. J. 190; Snyder v. Indus. Comm., — Ill. —, (1921), 130 N. E. 517.

27. Roll v. Monarch Cement Co., 100 Kan. 616, 164 Pac. 1078, A t W. C. L. J. 649.

28. Saddlemire v. Amer. Bridge Co., — Conn. —, (1920), 110 Atl. 63, 6 W. C. L. J. 130.

29. Saddlemire v. American Bridge Co., — Conn. —; (1920), 110 Atl. 63, 6 W. C. L. J. 130.

death or disability was caused by an accident which arose out of and in the course of the employment.[30]

A mere finding that claimant has not sustained the burden of proof that his condition resulted from an accident arising out of the employment where the evidence is disputed is insufficient to support a decision denying compensation and should be remanded for specific findings of fact.[31]

Where the record contains no facts a decree dismissing a petition for failure to comply with the law will be reversed where such failure might be due to one of several causes.[32]

Where facts pleaded would not constitute a defense, there need be no findings made with reference thereto.[33]

Where the findings of the commission have been affirmed by the district court, and there is no claim that the findings were procured by fraud the order will be disturbed only upon the showing of an abuse of the commission's power of discretion.[34]

A finding that the claimant widow had not sustained the burden of proof on the issue of marriage, is a question of law and reviewable.[35]

There being evidence to support the finding that an injured employee was in the employ of his employer, though furnished to a contractor, the finding will not be reviewed on certiorari.[36]

§ 555. **Powers of Commission or Board.**—The powers of any Industrial Board or Commission are generally limited to those specifically provided in the act which gives it being.[37] " It pos-

30. Dunnewald v. Henry Steers, 89 N. J. 601, 99 Atl. 345, B 1 W. C. L. J. 1135; E. I. DuPont de Nemours Powder Co. v. Spocidio, — N. J. —, 101 Atl. 407, B 1 W. C. L. J. 1147.

31. Billick v. Indus. Comm., — Colo. —, (1921), 195 Pac. 114.

32. Dodge v. Barstow Stove Co., — R. I. —, 100 Atl. 245, B. 1 W. C. L. J. 1514; Bloomfield v. November, 219 N. Y. App. 374, 114 N. E. 805, B 1 W. C. L. J. 1178.

33. Miller Scrap Iron Co. v. Indus. Comm., — Wis. —, (1921), 180 N. W. 826.

34. Koketevich v. Indus. Comm., — Colo. —, (1921), 195 Pac. 647.

35. Smith v. Heine Safety Boiler Co., — Me. —, (1921), 112 Atl. 516.

36. Kirkpatrick v. Indus. Acc. Comm., — Cal. App. —, 161 Pac. 274.

37. Johnstad v. Lake Superior Terminal & Transfer Co., 165 Wis. 499, 162 N.W. 659, 16 N. C. C. A. 747.

sesses only such authority and powers as have been conferred upon it by express grant or arise therefrom by implication as necessary and incidental to the full exercise of the granted powers."[38] The board does not have the power, "to apply the act to persons or corporations who are not subjet to its provisions or to any accident not within the provisions of the act."[39] The claim must be within the jurisdiction of the commission, if it is not, no action of the parties can confer jurisdiction.[40] Thus, where one is working upon navigable waters and is subject to admiralty law, the Industrial Commission has no jurisdiction.[41] There is no jurisdiction, and hence no power to make an award under a state compensation act, where the deceased was working upon an interstate train used in interstate commerce.[42] Where an accident occurs while the injured is engaged in interstate commerce, his sole remedy is under the Federal Employer's Liability Act.[43]

The Michigan Supreme court, in discussing the power of the board to fix compensation, said: "And while it may determine the compensation to be paid in a given case, it must do so pursuant

38. In re Levangie, 228 Mass. 213, 117 N. E. 200, 16 N. C. C. A. 744, Centralia Coal Co. v. Indus. Comm., — Ill. —, (1921), 130 N.E.727.

39. Hahnemann Hospital v. Industrial Board of Illinois, 282 Ill. 316, 118 N. E. 767, 16 N. C. C. A. 746, 1 W. C. L. J. 754; Bondykson v. Lyons Evangelistic Committee, — Mich. —, 161 N. W. 945, A. 1 W. C. L. J. 871.

40. Matter of Dosy v. Clarence P. Howland Co. Inc., 224 N. Y. 30, 120 N. E. 53; Waldum v. Lake Superior Terminal & Transfer Ry. Co. et al., 169 Wis. 137, 170 N. W. 729, 3 W. C. L. J. 671; Hassen v. Elm Coal Co., 184 N. Y. App. Div. 715, 172 N. Y Supp. 430, 3 W. C. L. J. 671.

41. Anderson v. Johnson Lighterage Co. et al., 224 N. Y. 539, 120 N. E. 55, 2 W. C. L. J. 674; London Guarantee & Accident Co. Ltd., v. Sterling, 233 Mass. 485, 124 N. E. 286, 4 W. C. L. J. 610; Keator et al. v. Rock Plaster Mfg. Co. et al., 224 N. Y. 540, 120 N. E. 56, 2 W. C. L. J. 675; Peters et al. v. Veasey, 251 U. S. 521, 40 Sup. Ct. Rep. 65, 5 W. C. L. J. 127.

42. Miller v. Grand Trunk Western Ry. Co., 201 Mich. 72, 166 N. W. 833, 1 W. C. L. J. 1021.

43. N. Y. Central Ry. Co. v. Winfield, (N. Y.), 244 U. S. 147, 37 Sup. Ct. 546, Ann. Cases 1917 D. 1139; Carey v. Grand Trunk Ry. Co., 200 Mich. 12, 166 N. E. 492, 1 W. C. L. J. 820; Thornton v. Grand Trunk Milwaukee Car Ferry Co., 202 Mich. 609, 166 N. W. 833, 1 W. C. L. J. 1019.

to the terms of the act. It has no power given it to fix and measure such compensation by the amount of damages provable, as in an action at law for a breach of either statutory or common-law duty."[44] "There is no presumption of jurisdiction in favor of a body exercising a limited or statutory jurisdiction, but the facts upon which the jurisdiction is founded must appear in the record."[45] Where the facts of the case "show that the * * * company expressed its consent by becoming a subscriber, the appellant by obtaining its license and permit and issuing the policy, and the appellee, herein by filing a claim for compensation," the appellant cannot set up that there was no consent to the board's action and hence no jurisdiction or power to act.[46]

The process and procedure under the acts are summary, and as simple as reasonably may be, and the powers of the administrative bodies are not confined to any set rules, but the bodies are unusually given the power to adopt reasonable and proper rules which are consistent with the act.[47] But the board cannot make a rule whereby an employee forfeits his compensation upon leaving the locality of employment without its consent for the commission cannot forfeit any part of the compensation without notice and a hearing. A claimant, violating the rules of the commission, has the burden of proving that he had good cause for failure to procure consent and that his absence has not predjudiced the employer.[48]

In a Delaware case the court said: "We think that the Industrial Accident Board was justified by the evidence and had the power and authority under section 133 to order Mike Frank, the claimant, to go to work for the Deemer Steel Casting Company, at the employment procured which was suitable to his ca-

44. McMullen v. Gavette Const, Co., 200 Mich. 203, 166 N. W. 1019, 16 N. C. C. A. 747, 1 W. C. L. J. 1006.

45. Tazewell Coal Co. v. Industrial Commission et al., 287 Ill. 465, 123 N. E. 28, 4 W. C. L. J. 41.

46. Southwestern Surety Ins. Co. v. Curtis et al., (Tex.), 200 S. W. 1162, 1 W. C. L. J. 875.

47. Zeitlow v. Smock, 64 Ind. App. —, 117 N. E. 665, 16 N.C. C. A. 750, 1 W. C. L. J. 174.

48. Varonkas v. Indus. Comm., — Utah —. 191 Pac. 1091, 6 W. C. L. J. 598.

pacity for work, and under section 103, subsec. "b" to make an order reducing his compensation from ten dollars fifty cents per week to three dollars ninety-four cents per week, until otherwise ordered by said board or terminated by the Delaware Workmen's Compensation Law of 1917; as amended."[49] Where the board has a rule limiting the grounds of defenses to those stated "on the arbitration hearing, and also on review before the full board," then any other defenses are not available.[50] Where the insurance carrier claimed that the commission had no jurisdiction in a case in which the commission allowed additional compensation, but before doing so served a notice that unless good cause to the contrary be shown in writing and filed within ten days, with the commission, the award would be increased to cover the further disability, the court said: "The petitioner claims that there was no jurisdiction to make an award, because of the fact that the notice did not state the time for hearing, * * * The Workmen's Compensation Act empowers the commission to adopt reasonable and proper rules of practice in proceedings before it. Only notice or method of procedure which does not transgress the constitutional mandate regarding due process of law, or the provisions of the act itself, is within the power of the commission. It is not obliged to follow the methods in use in the ordinary courts of the land. * * * The act provides that such awards may be amended if opportunity to be heard is given."[51] Where a provision of the act authorizes the commission to, "apportion such benefits among the dependents in proportion to their respective needs," the court said that, "The question what disposition in any particular case is in proportion to the respective needs of the dependents and just and equitable is, of course, one of fact, the determination of which is committed to the commission, and in its

49. Frank v. Deemer Steel Castings Co., — Del. —, 110 Atl. 561, 6 W. C. L. J. 441.

50. Roach v. Kelsey Wheel Co., 200 Mich. 299, 167 N. W. 33, 16 N. C. C. A. 814, 1 W. C. L. J. 1025.

51. Mass. Bonding & Ins. Co. v. Ind. Acc. Comm. of Cal., 176 Cal. 488, 168 Pac. 1050, 1 W. C. L. J. 485.

determination the commission is necessarily invested with a large discretion." [52]

"The board possesses only powers expressly granted together with those arising from implication, because necessary to the full exercise of the granted powers." [53] The courts will not permit the assumption of arbitrary powers by the commission. Thus, in a New York case, the commission awarded compensation for the total loss of use of an eye, in spite of the fact that an eye specialist had filed a report to the effect that in the course of one to three years, vision would materially improve. The court in recommitting the case to the commission said: "The question as to whether the proceedings should be continued or closed was one involving not merely the exercise of discretion, but involved as well a substantial right of the appellants, the denial of which was prejudicial to them and imposed upon them a burden which the statute did not contemplate should be placed upon them." [54]

A definite schedule is provided in most acts for the amount of benefits to which the injured employee is entitled on account of the loss of specific members, and in addition to the schedule there is usually a general provision which gives the board power to fix the compensation for other injuries causing disability. In a case in which the ring and small fingers of the right hand were injured the court said that, " It became the duty of the board to fix the compensation in its discretion." [55] In a New York case where the question of the existence of a policy was at issue the court said that, "While the commission has the power to determine whether the policy still existed, it must determine that question on recognized principles of law." [56]

52. Perry et al. v. Industrial Acc. Comm. et al., 176 Cal. 706, 169 Pac. 353.

53. Aetna Life Ins. Co. v. Shiveley et al., — Ind. App. —, 121 N. E. 50, 3 W. C. L. J. 261.

54. Archangelo v. Callo & Laguidara, 177 App. Div. 31, 163 N. Y. Supp. 727, 16 N. C. C. A. 753.

55. Kenwood Bridge Co. v. Stanley, 64 Ind. App. —, 117 N. E. 657, 1 W. C. L. J. 168, 16 N. C. C. A. 756.

56. Kolb v. Brummer et al., N. Y.. App. Div. 835, 173 N. Y. Supp. 72, 3 W. C. L. J. 351.

Where the right to appeal from the referee's decision to the board is given by the act, but is limited to "ten days after notice," the board has no power to extend the time.[57]

The Board or Commission does not have power to take testimony *ex parte*.[58] "The statute clearly contemplates and requires that, where the merits of the case require a decision upon a question of disputed facts, both parties shall have an opportunity, not only to present such evidence as they may desire but also to be present at the taking and hearing of the evidence by the opposite party, * * *. The Industrial Board states in its findings and award that the decision is based upon statements of witnesses taken *ex parte* and reported by the special investigator appointed for that purpose. No matter what the character of the evidence so taken was, the board did not act within its powers in making it the basis of the finding and award."[59]

The Board has the power to weigh the evidence and draw its own conclusions. In an Indiana case the court said: "And such board, like a court or jury, may draw reasonable inferences from the facts and circumstances in evidence and where it draws such inferences from facts and circumstances which in their nature are such that reasonable men might draw either the same or opposite inferences, the court cannot say that the fact found as a result of such inferences is not sustained by sufficient evidence." Citing Western Union Telegraph Co. v. Louisville, etc., Co., 183 Ind. 258, N. E. 951, An. Cases 1917B 705; Gish v. St. Joseph, etc., Co., 113 N. E. 394; Interstate Iron & Steel Co. v. Szot et al., 115 N. E. 599.[60]

Under the California Act it has been held that the commission had power to make an award for medical, surgical and hospital expenses prior to making an award for the injury. Which

57. Wise v. Borough of Cambridge Springs, 262 Pa. 139, 104 Atl. 863, 3 W. C. L. J. 196.

58. Ruda v. Industrial Board of Ill., 283 Ill. 550, 119 N. E. 579, 16 N. C. C. A. 750, 2 W. C. L. J. 220.

59. Bereda Mfg. Co. v. Industrial Board of Ill., 275 Ill. 514, 114 N. E. 275, 16 N. C. C. A. 750.

60. Haskell & Barker Car Co. v. Brown, 64 Ind. App. —, 117 N. E. 555, 1 W. C. L. J. 48.

compensation could be granted by means of a supplemental award when the requisite information was in the hands of the commission.[61]

The Board has power to reopen its award and correct the same when it finds that it has acted under an erroneous impression concerning the facts of the case;[62] or to correct inadvertences or mistakes, but such authority must be exercised in harmony with the provisions of the act giving the courts jurisdiction to set aside awards.[63] But after the time for review has passed, the commission has no jurisdiction to set aside a decision which has become *res judicata*.[64]

The jurisdiction of an industrial commission over each case submitted to it is continuing and the commission may from time to time make such changes of its former findings as it deems just under the circumstances.[65]

Where a commissioner has made an award for the loss of one leg and has left an injury to the left leg for further consideration, he may designate another commissioner to hear the proceeding for a modification of the original award where he deems himself prejudiced.[66]

Although courts cannot, by construction, legislate and give to the industrial commission power not granted by the Workmen's Compensation Act, a grant of power in furtherance of the legislative power apparent from the act, will authorize the use and exercise of such incidental powers as are necessary to accomplish the object sought by the legislation. The commission having

61. McBride v. Indus. Acc. Comm., — Cal. —, 187 Pac. 1050, 5 W. C. L. J. 648.

62. Fair v. Hartford Rubber Wks., — Conn —, (1920), 111 Atl. 193, 6 W. C. L. J. 521.

63. Blair v. Miller's Indemnity Underwriters, — Tex. Civ App. —, 220 S. W. 787, 6 W. C. L. J. 105.

64. Centralia Coal Co v. Indus. Comm., — Ill. —, (1921), 130 N. E. 727.

65. Choctaw Portland Cement Co. v. Lamb, — Okla. —, (1920), 189 Pac. 750, 6 W. C. L. J. 207; Kennedy v. Indus. Comm., —Cal. App. —, (1921), 195 Pac. 267.

66. Saddlemire v. American Bridge Co., — Conn. —, (1920), 110 Atl. 63, 6 W. C. L. J. 130.

authority to delegate to a deputy or a referee, power to take testimony, such delegation necessarily implies the authority to administer oaths.[67]

It has been held that it is within the discretion of the Industrial Commission of Utah to fix a certain number of weeks compensation in favor of partially dependent parents of a deceased employee.[68]

The board has authority to pass on the reasonableness of an attorney's fees, but does not have authority to determine the legality of a contract for the payment for services in independent proceedings, even though such contract is made payable out of the award of compensation made by the commission.[69]

The industrial commission being an administrative body receiving its authority from the statutes and not a court, it has no power to certify or send proceedings brought before it to other courts.[70]

Where, under the Illinois Act, the commission, in reviewing the decision of an arbitration committee, based its award on statements of persons, procured by a special investigator appointed by it, and on his report, of which one of the parties had no notice or knowledge it was held that the commission did not act within its powers, but contrary to law.[71]

Where a claim has not been made within the statutory time for making claims, an offer to settle, or caring for medical bills does not operate as a waiver of the employer's right to plead the statute of limitations, since the Industrial Commission's jurisdiction cannot be enlarged or diminished by agreement between the parties, or waived by acts of estoppel.[72]

An insurance contract can in no way enlarge or restrict the operation of the Workmen's Compensation Act. Therefore the in-

67. Utah Copper Co. v. Indus. Comm., — Utah —, (1920), 193 Pac. 24, 7 W. C. L. J. 147.

68. Uintah Power & Light Co. v. Indus. Comm., — Utah —, 189 Pac 875, 6 W. C. L. J. 229.

69. Schilling v. Indus. Acc. Comm., — Cal. App. —, (1920), 190 Pac. 373, 6 W. C. L. J. 268.

70. Brunette v. Brunette, — Wis. —, (1920), 177 N. W. 593, 6 W. C. L. J. 236.

71. Bereda Mfg. Co. v. Indus. Board, 275 Ill. 514, 114 N. E. 275, A. 1 W. C. L. J. 323.

72. Petraska v. National Acme Co., — Vt. —, (1921), 113 Atl. 536.

dustrial commission has no power to adjudicate questions other than those arising under the compensation act, on the ground of estoppel on the part of the insurer to deny liability on its policy which it was thought covered one not an employee.[73]

Granting of continuances is discretionary with the commission and in the absence of abuse of that discretion its action will not be disturbed.[74]

The Michigan Industrial Board is not a judicial body and can exercise only such powers as are granted by statute, and therefore it is not authorized to set aside the findings of the Arbitration Board denying compensation and order resubmission to a new board.[75]

Where it was conceded that the relationship of employer and employee existed and both parties were operating under the act, the commission had jurisdiction to determine whether the injury arose out of and in the course of the employment and did not have to dismiss the case as one within the jurisdiction of the court and not the Industrial Commission.[76]

The Industrial Accident Commission of Maine has jurisdiction to hear the claim of a widow of an employee of a New York Corporation killed while doing work for it in Maine, even though the widow and deceased were residents of New York.[77]

73. Porter v. Industrial Comm.; Wisconsin State Register Co. v. Same, — Wis. —, (1921), 181 N. W. 317.

74. MacDonald v. Employers' Liab. Assur. Corp., — Me. —, (1921), 112 Atl. 719.

75. Jones v. St. Joseph Iron Works, — Mich. —, (1920), 180 N. W. 374, 7 W. C. L. J. 315.

76. Utah Fuel Co. v. Indus. Comm., — Utah —, (1920), 194 Pac. 122, 7 W. C. L. J. 370.

77. Smith v. Heine Safety Boiler Co., — Maine —, (1921), 112 Atl. 516.

CHAPTER XVII.

APPEAL.

§
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§ 556. **General.**—The right of appeal under all compensation acts is, of course, statutory, and a party desiring to avail himself of such privilege must comply with the statute in that regard.[78]

Though while the acts of most states explicitly provide the manner of taking an appeal from the decisions of the boards, commissions and inferior courts, or for review by certiorari, where this is not done the general common law or code practice of the state prevails.

While it may generally be said that unless the proper procedure is followed, and the award of the commission or court of original jurisdiction is appealed from in the statutory manner, the award will be conclusive, yet it has been held in a number of states that the appellate court's constitutional power to review questions of law cannot be limited by special provisions contained

78. Stacks v. Ind. Comm. of Col., 65 Col. 20, 174 Pac. 588, 2 W. C. L. J. 756, 18 N. C. C. A. 203; Morris v. Yough Coal and Supply Co., — Pa. —, 109 Atl. 914, 6 W. C. L. J. 210; State v. Indus. Comm., — Wis. —, 179 N. W. 579, 6 W. C. L. J. 731; Holland Mfg. Co. v. Thomas, — Md. App. —, 110 Atl. 209; Western F. Co. v. Ind. Bd., — Ill. —, 132 N. E. 218, (1921).

in the act.[79] Thus in Washington a provision that a decision of the commission shall be prima facie correct, does not prevent the court determining questions of law as to what injuries are within the statute's operation.[80] And a provision of the California Act that the finding on questions of fact shall be final and conclusive, does not conclude the courts from reviewing and annulling, where the finding of a jurisdictional fact is without substantial evidence.[81] And in Illinois, where the act attempted to give the Supreme Court the same power and authority to review a case and with like effect as if it had been carried up by appeal or writ of error, it was held that the legislature had no power to confer original jurisdiction upon the court, and the case can only be reviewed by a court having jurisdiction to issue the common law writ of certiorari, and in Illinois only circuit courts and the Superior Court of Cook County have such jurisdiction.[82]

With a view to expediting the disposal of compensation cases the legislatures have generally set out certain modes of procedure and limitations of time within which appeals must be taken. The particular act must be examined for procedure on appeal, as the methods vary greatly under the different acts.

Section 44 of the Missouri act provides that the award may be appealed to the circuit court for errors of law, and that appeal from the circuit court lies as in civil actions, with precedence in all instances over all cases save election contests.

Art. 11, Sec. 10, 13, of the Oklahoma act provides for appeal upon errors of law only within 30 days after the decision of the commission. Under 3678 Sec. 128, and 3680 Sec. 130, of the Nebraska act, after the case has been tried in equity on questions of facts and law, appeal may be taken to the Supreme Court within 30 days following the court's decision. The Supreme court must hear the case within 60 days after filing.

79. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35, 9 N. C. C. A. 466.

80. Zappala v. Ind. Ins. Comm., 82 Wash. 314, 144 Pac. 54.

81. Employers Assur. Corp. v. Ind. Acc. Comm., 170 Cal. 800, 151 Pac. 423.

82. Courter v. Simpson Const. Co., 264 Ill. 488, 106 N. E. 350, 6. N. C. C. A. 548; Eugene Dietzgen Co. v. Ind. Bd., — Ill. —, 132 N. E. 541, (1921).

Under Sec. 52 of the Kentucky act the review is limited to determining whether or not: 1. "The board acted without or in excess of its powers. 2. The order, decision or award was procured by fraud. 3. The order, decision or award is not in conformity to the provision of this act. 4. If findings of fact are in issue, whether such findings of fact support the order, decision or award." And (Sec. 53) the circuit court's judgment may be reviewed by the court of appeals where under the existing laws the amount involved is sufficient to authorize an appeal to that court.

Sec. 32 of the Tennessee act provides that an appeal may be taken from the decision of the county court to the next term of the circuit court, where the case is heard de novo. The judgment of the circuit court may be appealed from as in other cases.

Sec. 2477—M 33, of the Iowa act, provides that in order to appeal, a written application must be filed with the commissioner within 30 days following his decision. Within 30 days thereafter the commissioner must file a record of the case with the District Court. From the judgment of the District Court appeal may be taken to the Supreme Court. The order of the commissioner may not be set aside save upon certain specific grounds.

Under Sec. 19 of the Illinois act, the Circuit court may review the award by writ of certiorari upon application within 20 days by a party in interest. The judgment of the circuit court may be reviewed by the supreme court upon writ of error, within the time limited by the statute which is the first Supreme Court term following the rendition of the judgment in the circuit court.[83]

Generally only questions of law are reviewable by the courts on appeal from the boards or commissions. "It is not the scheme of the act to make the court a reviewer of facts. Its office is to relieve against fraud, to keep the commission within its jurisdictional bounds, and to correct an award not supported by the facts found."[84] The conclusiveness of findings of fact is treated, ante chapter XVI· section 554.

83. City of Chicago v. Indus. Comm., — Ill. —, 127 N. E. 46, 6 W. C. L. J. 19.

84. Milwaukee v. Ind. Comm., 160 Wis. 238, 151 N. W. 247; Stephenson v. Indus. Comm., — Okla. —, (1920), 192 Pac. 580, 6 W. C. L. J. 711.

An exception to the rule that questions of fact are not reviewable, is the procedure under the Maryland act. Sec. 56 of the act provides that "Upon the hearing of such an appeal the court shall, upon motion of either party filed with the clerk of the court according to the practice in civil cases, submit to a jury any question of fact involved in such case." The questions of fact presented on appeal in Maryland are for the determination of the jury. But the decision of the commission shall be considered prima facie correct, and the burden of proof is upon the party attacking the commission's decision.[85]

§ 557. **Jurisdiction.**—The procedure on appeal in compensation proceeding does not differ materially from the statutory appeal in other cases. Hence, the jurisdiction of the courts is acquired by the statutory method of appeal, subject to such limitations as the compensation act imposes, which are not derogatory to the constitutional rights of the courts. "The circuit courts have jurisdiction to issue the common-law writ of certiorari to review the decisions of the board for the purpose of determining whether it has jurisdiction or whether it has exceeded its powers and acted illegally."[86] Prior to the amendment of 1919 it was held in Illinois that the circuit court had "jurisdiction to review the record by certiorari without the necessity of a review of the decision of the arbitrator by the commission."[87]

Section 19 (b) of the act, as amended in 1919, provides that all decisions of the commission are subject to review except such decisions of the arbitrator or committee which have become the decision of the commission by failure to petition for a review by the commission. In other words the failure to petition for a re-

The Illinois Act was amended in 1921 permitting review of findings of fact.

85. Jewel Tea Co. v. Weber, 132 Md. 178, 103 Atl. 476, 18 N. C. C. A. 237, 2 W. C. L. J. 87; Coastwise Shipbuilding Co. v. Tolson, 132 Md. 203, 103 Atl. 478, 18 N. C. C. A. 237, 2 W. C. L. J. 91; Stewart & Co. v. Howell, — Md. —, 110 Atl. 899, 6 W. C. L. J. 452.

86. Courter v. The Simpson Construction Co., 264 Ill. 488, 106 N. E. 350, 6 N. C. C. A. 548.

87. Jakub v. Ind. Comm. et al., 288 Ill. 87, 123 N. E. 263, 4 W. C. L. J. 153.

view by the commission where the decision of the arbitrator or arbitration committee is adverse, concludes the adverse party from securing a review by writ of certiorari in the circuit court.

Jurisdiction is not acquired save in strict compliance with the statutory provisions. The court said, where the jurisdiction of the court below was questioned that, "there was no sufficient application-that is, as we understand it, no sufficient *praecipe* —and under the holdings of this court in Smith-Lohr Coal Mining Co. v. Industrial Board, 279 Ill. 88, 116 N. E. 656, we think that *praecipe* in due form was necessary in order to give the court judisdiction."[88]

In reviewing awards on certiorari the Illinois Circuit Courts exercise special jurisdiction conferred by the act, and they cannot maintain such proceeding by virtue of their general powers. Circuit Courts of the county where some of the defendants reside are the only courts having jurisdiction to issue writs of certiorari, and where a circuit court without jurisdiction issued a writ, it may, under the venue act, Sec. 36, transfer the proceeding to a circuit court of the county wherein some of the defendants reside.[89]

The Industrial Commission acquired jurisdiction by the petition of the employer for review of the arbitrator's award, and the requirement of Sec. 19 of the Illinois act for the filing of an agreed statement or stenographer's report with the commission being directory, time may be allowed for the purpose of filing such report. The commission may allow the amending of an incorrect stenographic report.[90]

The Supreme Court of Iowa held that where a voluntary agreement for compensation had been reached under the terms of the act and had been approved by the commissioner, and the district

88. L. & N. R. R. Co. v. Ind. Board, 282 Ill. 136, 118 N. E. 483, 1 W. C; L. J. 542; Wm. Rahr Sons Co. v. Indus. Comm., — Wis. —, 163 N. W. 169, B 1 W. C. L. J. 1705; Midget Consol. Gold Mining Co. v. Indus. Comm., — Colo —, (1920), 193 Pac. 493, 7 W. C. L. J. 26.

89. Central Ill. Pub. Serv. Co. v. Indus. Comm., — Ill. —, (1920), 127 N. E. 80, 6 W. C. L. J. 9.

90. Lawrence Ice Cream Co. v. Industrial Comm., — Ill. —, (1921), 131 N. E. 369. But see Western F. Co. v. Ind. Bd., — Ill. —, 132 N. E. 218, (1921).

court as the statute provided, then the supreme court had no jurisdiction to entertain an appeal.[91]

In New York the commission certified a question concerning its power to the appellate division. The question was answered affirmatively and was appealed. In dismissing the appeal the court said: "The determination of such an appeal is not within our jurisdiction. * * * The commission made no decision. There was no case or controversy before it. * * * The members of the commission, debating their powers among themselves, asked and obtained the advisory opinion of the court. Without notice to the carriers to be affected by their action, they fortified themselves in advance by judicial instruction. In such circumstances the answer of the appellate division bound no one and settled nothing. We do not know that the commission will ever adopt the proposed resolution. If it does and so notifies the carriers, the legality of its action will remain open for contest in the courts. No advice that may now be given in response to a request for light and guidance can prejudice the issue or control the outcome."[92]

In discussing jurisdiction, the court (N. Y.) said: "Where there are facts before the court for determination on which the question of jurisdiction depends, of course the adjudication may be reviewed only on appeal. * * * * It matters not how complete the adjudication may be, if the court was without power or jurisdiction, its judgment or decree is without avail."[93]

Where the statute provides that a petition for a rehearing shall be filed with the commission within a certain time, before the courts shall be permitted to have jurisdiction of an appeal, the court said that, "the claimant failed to avail himself of his right to petition for a rehearing before he appealed to the district court, and for this reason the appeal was incompetent and futile."[94]

91. Bach v. Interurban Ry. Co., (Iowa), 174 N. W. 333, 4 W. C. L. J. 153.

92. In re Workmen's Compensation Fund, 224 N. Y. 13, 119 N. E. 1027, 18 N. C. C. A. 227, 2 W. C. L. J. 543.

93. Sullivan v. Hudson Nav. Co., 182 N. Y. 152, 169 N. Y. Supp. 645, 1 W. C. L. J. 1105.

94. Passni v. Ind. Comm. of Col., 171 Pac. 369, 64 Col. 349, 18 N. C. C. A. 217, 1 W. C. L. J. 927; Indus. Comm. of Ohio v. Glenn, — Ohio —, 1920, 129 N. E. 687.

Jurisdictional matters may be determined on certiorari.[95] The court in an Iowa case said: "We think the conclusion is quite inevitable that, where the objection made is clearly one of jurisdictional nature, and it satisfactorily appears that the proceeding sought to be reviewed is wholly unauthorized, a mere right of appeal is not a speedy or adequate remedy within the meaning of the statute, and certiorari will lie. * * * Facts must be alleged which, if true, demonstrate that the proceedings complained of were unauthorized and that the tribunal in which they were had was without power or authority to entertain them: otherwise the matters and things complained of are, at most, erroneous, and not void, and must be reviewed by appeal, if at all."[96]

And in Minnesota: "The statute contemplates the review of questions of law arising in the administration of the compensation act by certiorari. G. S. 1913, Sec. 8225. It does not intend the review by certiorari of orders and judgments not in their nature appealable under our practice."[97]

In Utah: "We are further constrained to hold that—in view that it is alleged in the application for a writ of certiorari filed in the district court that the commission found without any evidence whatever that the claimant was entitled to receive compensation under the act, and that its order is based upon that finding—the finding and order were necessarily in excess of its power and jurisdiction, and hence subject to review by certiorari under our constitution and statute."[98]

Where the decision of the commission is before the circuit court for review on writ of certiorari, it has authority only to affirm the commission's findings and award, or enter a decision

95. Shevchenko v. Detroit United Ry., 189 Mich. 421, 155 N. W. 423, 14 N. C. C. A. 98.

96. Des. Moines Union Ry. Co. v. Funk, (Iowa), 164 N. W. 648, 18 N. C. C. A. 240.

97. Chambers v. Dist. Court Hennepin Co., 139 Minn. 205, 166 N. W. 185, 1 W. C. L. J. 638, 18 N. C. C. A. 240.

98. Industrial Comm. of Utah v. Evans, 52 Utah—, 174 Pac. 825, 18 N. C. C. A. 207, 2 W. C. L. J. 848.

justified by law or remand the case. It cannot enter a money judgment and order execution.[99]

The superior court at Baltimore does not have jurisdiction to entertain an appeal because of the fact that the commission sits there. The court held that the appeal should be taken in the county in which the accident occurred.[1]

The Supreme court of Massachusetts, in a decision under its compensation act, has defiined the jurisdiction of the inferior court on review, where the superior court had denied a motion to remit a case to the board for certain amendments on the ground that it had no authority to do so. The court on appeal said: "The motion was rightly denied. But the reason given for denying the motion was wrong. The Supreme court did have authority to make the order asked for. When copies of the decision of the board and all papers in connection therewith have been transmitted to the superior court it is the duty of that court to take such action and make such a decree as the law requires on the facts found by the board. It is for the superior court to determine what order or decree ought to be made on the facts found, and it has jurisdiction over the case in the same way and to the same extent as it has when, for example, the facts have been found by a master in a suit in equity."[2]

In Massachusetts any party may present certified copies of an order of the Industrial Board to a court in order that such court may obtain jurisdiction so that a decree may be rendered in accordance therewith. The filing of such copies within 10 days is not a condition to the acquirement of jurisdiction by the court, but is simply a condition precedent to appeal, and when not com-

99. Tribune Co. v. Ind. Comm., 290 Ill. 402, 125 N. E. 351, 5 W. C. L. J. 351; Otis Elevator Co. v. Ind. Comm., 238 Ill. 516, 123 N. E. 600, 4 W. C. L. J. 364; O. W. Rosenthal Co. v. Ind. Comm. et al., 290 Ill. 323, 125 N. E. 250, 5 W. C. L. J. 196; Baum v. Ind. Comm., 288 Ill. 396, 123 N. E. 625, 4 W. C. L. J. 357; E. Baggott Co. v. Ind. Comm. 290 Ill. 530, 125 N. E. 254, 5 W. C. L. J. 202; Juergens Bros. Co. v. Ind. Comm., 290 Ill. 420, 125 N. E. 337, 5 W. C. L. J. 369; McGarry v. Ind. Comm., 290 Ill. 577, 125 N. E. 318, 5 W. C. L. J. 372.

1. Brenner v. Brenner, 127 Md. 189, 96 Atl. 287, 14 N. C. C. A. 89, Maguire's Case, — Me. —, 115 Atl. 176, (1921.).

2. Brown's Case, 228 Mass. 31, 116 N. E. 897, 18 N. C. C. A. 241.

plied with the superior court will enforce the decree of the Board unless there is a legal reason to the contrary.[3]

The failure to begin an action for the purpose of review within 20 days after an award, in which the adverse party, namely the person in whose favor an award is made, shall be made a defendant, precludes the obtaining of jurisdiction by the court.[4]

In an Illinois case the circuit court made an order retaining jurisdiction. It was sought to reverse upon that ground and the court held that the order was unnecessary and hence the case not reversible, as Section 19, paragraph (g), of the act gives the court power to resume jurisdiction at any time.[5]

Where the question of the commission's jurisdiction is involved, the court may consider the evidence and determine the jurisdictional question. In the words of the Illinois Supreme Court, "The Industrial Commission has no jurisdiction to apply the act to persons who are not subject to its provisions, and the evidence certified in the record may be reviewed to determine the question of jurisdiction."[6]

There were jurisdictional questions involved in an Illinois case and the record brought up on certiorari, the court had the power to review the evidence in the record. The court said: "We think it is therefore proper for us to review the record, including the evidence certified, and from the same determine the two jurisdictional questions presented for our consideration in this appeal."[7]

3. Sciola's case, — Mass. —, (1920), 128 N. E. 666, 7 W. C. L. J. 72; Chisholm's case, — Mass. —, (1921), 131 N. E. 161.

4. Milwaukee Western Fuel Co. v. Indus. Comm., — Wis. —, (1920), 179 N. W. 763, 7 W. C. L. J. 176; Richmond Cedar Works v. Harper, — Va. —, (1921), 106 S. E. 516.

5. Armour & Co. v. Ind. Acc. Comm. of Ill., 273 Ill. 590, 113 N. E. 138, 14 N. C. C. A. 105.

6. Thede Bros. v. Ind. Comm. 285 Ill. 483, 121 N. E. 172, 3 W. C. L. J. 242, 18 N. C. C. A. 226.

7. Hahnemann Hospital v. Ind. Bd. of Ill., 282 Ill. 316, 118 N. E. 767, 18 N. C. C. A. 226, 1 W. C. L. J. 754.

Where the transcript and assignment of errors are filed more than 50 days after an award and the statutory limit is 30 days, the court acquires no jurisdiction.[8]

Where an amendment limits review by the Supreme Court to a writ of error applied for at the first Supreme Court term following the rendition of the judgment in the Circuit Court, the limitation applies to judgments entered in the Circuit Court prior to the date the amendment became effective, the court saying: "This court has repeatedly held that the law is well settled that there can be no vested right in any particular remedy, method, or procedure, and 'that, while the general rule is that statutes will not be so construed as to give them a retrospective operation unless it clearly appears that such was the legislative intention, still, when the change merely affects the remedy or the law of procedure, all rights of action will be enforceable under the new procedure, without regard to whether they accrued before or after such change in the law, and without regard to whether suit had been instituted or not unless there is a saving clause as to existing litigation.' Chicago & Western Indiana Railroad Co. v. Guthrie, 192 Ill. 579, 61 N. E. 658. To the same effect are Dobbins v. First Nat. Bank, 112 Ill. 553; Winslow v. People, 117 Ill. 152, 7 N. E. 135; People v. Clark, 283, Ill. 221, 119 N. E. 329."[9]

It has been held that the amendment of 1919 to the Utah Industrial Commission Act, to provide for review of Commission's decisions on certiorari or review in the Supreme Court in first instance, instead of the district court, does not affect cases pending and being prosecuted prior to the time the amendment became effective.[10]

While a failure to give notice of an accident as required by the act may deprive the Industrial Commission of jurisdiction, it

8. C. & W. Kramer Co. v. Miller, — Ind. App. —, 115 N. E. 597, A 1 W. C. L. J. 506; Humphrey v. Emp. Liab. Assur. Corp., 226 Mass. 143, 115 N. E. 253, A 1 W. C. L. J. 786.

9. City of Chicago v. Indus. Comm., — Ill. —, (1920), 127 N. E. 46, 6 W. C. L. J. 19; National Zinc Co. v. Indus. Comm., — Ill. —, (1920), 127 N. E. 135, 6 W. C. L. J. 21.

10. Indus. Comm. v. Agee, — Utah, —, (1920), 189 Pac. 414, 6 W. C. L. J. 114.

does not thereby confer jurisdiction upon a court in an action for damages.[11]

Under the Texas Workmen's Compensation Act (Vernon's Sayles' Ann. Civ. St. 1914, Art. 5246g) a claimant may bring his claim for compensation before the Industrial Accident board but before final determination by the board the parties have the right to sue or require suit to be brought in court, and the jurisdiction of the court is not dependent upon notice having first been given of the parties' unwillingness to abide by the decision of the board; but the board's decision when it is rendered is not conclusive and the right to sue or require suit is by way of appeal.[12]

Where an action on contract was brought by an injured employee against the employer's insurer on the theory that the employer had made a contract with the insurance company to indemnify it against loss on account of injuries to employees, it was held that, since both the employee and employer were covered by the compensation act the municipal court, in which the action was filed, had no jurisdiction of the case.[13]

The Texas District Court on appeal from a judgment of the Industrial Accident Board refusing to commute weekly payments into a lump sum, has jurisdiction to try the question of totality and permanence of the injury as well as the right to lump sum payment, presented as issues before the board, and the board cannot deprive the district court of jurisdiction by making the judgment contingent and providing for further hearings on the issue of a lump sum.[14]

In a suit in the District Court of Texas to enforce an award, under The Workmen's Compensation Act, the court has jurisdiction

11. Dominguez v. Pendola, — Cal. App. —, (1920), 188 Pac. 1025, 6 W. C. L. J. 3.

12. Texas Employers Ins. Ass'n v. Roach, — Tex. Comm. of App. —, 222, S. W. 159, 6 W. C. L. J. 400.

13. Burns v. Millers Mutual Cas. Co., — Minn. —, 178 N. W. 812, 6 W. C. L. J. 461.

14. Southern Surety Co. v. Hendley, — Tex. Civ. App. —, (1920), 226 S. W. 454.

if there are sufficient installments due to amount to the jurisdictional amount.[15]

Under the Virginia Act the Supreme Court of that state has no jurisdiction to entertain an appeal direct from the Industrial Commission's award, unless possibly under the constitution (1902, Sec. 88,) where a constitutional question is raised, or there is an attempt to exceed jurisdiction justifying an exercise of original jurisdiction to issue the writ of prohibition; the compensation act exclusively provides the remedies for review, notwithstanding the general provisions in the code (1919f, Sec. 6336,) for appeals.[16]

In holding that the court had jurisdiction on appeal the court said: "We fail to understand what is meant in the second ground for dismissal, to the effect that the judgment in the trial court had become final in the trial court before any appeal was taken. The judgment was rendered February 14, 1917, and the motion for appeal was made March 6, 1917, It is noticed that plaintiff filed a motion to vacate the order of appeal, and defendant, appellant, excepted to the jurisdiction of the trial court to try or consider the motion to vacate and rescind its order of appeal, on the ground that the said cause had been lodged in the Court of Appeal. This appears from the reading of the minutes, although the minutes may be somewhat confused.

"The appeal had been taken to and lodged in the Court of Appeal, which court transferred the case to this court, as the amount involved exceeded the limit of the jurisdiction of that court.

"This ground for dismissal is: 'There was no order for appeal herein, the original order having been vacated by judgment of the trial court.'

"This point was disposed of under paragraph 2, which says that the minutes of the court show that the order of appeal had not been vacated, but that the exception to the jurisdiction of the court to try the motion to vacate had been sustained.

15. Roach v. Texas Employer's Ins. Ass'n., — Tex. Civ. App. —, 195 S. W. 328, B 1 W. C. L. J. 1583.

16. Richmond Cedar Works v. Harper, — Va. —. (1921), 106 S. E. 516.

"Appellee says: 'There was no appeal bond filed in the trial court.' This is true, but reference to section 19, Act 20, of 1914, p. 57, which is the Employer's Liability Act, provides that: 'Such appeal may be prosecuted by either employer or employee without the necessity of furnishing an appeal bond, and shall suspend the operation of the judgment appealed from.'"[17]

§ 558. **Right of Appeal.**—The right of appeal is purely statutory and is subject to all of the limitations and restrictions imposed by the statutes which define the right. Thus, in California, where the statutory limitation was not observed, the court said: "Conceding that the record upon this application for a writ of review directed to the industrial commission on its face was beyond and in excess of the jurisdiction of the commission, nevertheless it also appears that the petition for the writ to this court was not made within 30 days after the award of the commission as prescribed by the statute. That statute, we think, must be regarded as a statute of limitations in so far as the right of the petitioner to apply for the writ is concerned, and the application has not been made within the statutory time."[18]

The question was raised in Iowa that the act did not provide for an appeal from an assessment of damages under the act. The court in holding that it did, set out the only restriction on the right of appeal: "Either party may cause a certified copy of the award, together with all the papers in the case, to be presented to the district court and thereupon the court shall render a decree in accordance therewith and notify the parties. 'Such decree,' says the statute, 'shall have the same effect and in all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determined by said court' * * * a right of appeal would have been fully preserved under the general statute * * * unless it be taken away or denied by other language of the enactment. The only other language there-

17. Craver v. Gillespie, — La. —, 86 So. 730, 7 W. C. L. J. 300.

18. Northern Pac. S. S. Co. v. Ind. Acc. Comm., 34 Cal. App. 488, 168 Pac. 30, 18 N. C. C. A. 208; Sciola's Case — Mass. —, 128 N. E. 666, 7 W. C. L. J. 72; Indus. Comm. v. Davidson, — Ohio —, 126 N. E. 876, 6 W. C. L. J 96.

in having any bearing upon this proposition is * * * 'Except there shall be no appeal therefrom on questions of fact or where the decree is based upon an order or decision of the commissioner which has not been presented to the court within ten days after the notice of the filing thereof by the commissioner.' Surely this does not take away the right of appeal except upon questions of fact. Upon all issues of law that right remains as full and unrestricted in these cases as in cases brought and prosecuted to judgment in ordinary proceedings or in equity."[19]

Under Section 23 of the New York Act, appeals may be taken as in civil cases, and are subject to the limitations provided in civil actions.[20] But under the New York Act, where the employer is insured in the state fund, his interest is so remote that he has no right of appeal.[21] In Utah the holding is contra to the above, as all employers are entitled to appeal "whether they are insured in the state insurance fund, and hence are direct contributors thereto, or whether their risks are carried by an insurance carrier, or whether self insured."[22] In order to have the right of appeal under the Ohio Act, "there must be a denial of his right to participate at all in such (state) fund, based upon one of the jurisdictional matters enumerated in the section (43)."[23]

Thus in Ohio, where an employee is denied participation in the state fund, by reason of the employer having elected to pay direct to the employee, the employer may appeal to the court of common pleas.[24] Questions of law and equity alone are appealable under the Rhode Island Act.[25]

19. Des Moines Union Ry. Co. v. Funk, (Iowa), 164 N. W. 648, 18 N. C. C. A. 207.

20. Hartnett v. Thomas J. Steen Co., 216 N. Y. 101, 10 N. C. C. A. 984, 110 N. E. 170.

21. Crockett v. International R. Co., 170 N. Y. App. Div. 122, 155 N. Y. Supp. 431, 14 N. C. C. A. 88.

22. Ind. Comm. of Utah v. Evans, — Utah —, 174 Pac. 825, 18 N. C. C. A. 207, 2 W. C. L. J. 848.

23. Snyder v. State Liability Board of Awards, (Ohio), 114 N. E. 268, 14 N. C. C. A. 93.

24. Reinholz v. Ind. Comm. of Ohio, 96 Ohio 457, 119 N. E. 129, 1 W. C. L. J. 1138, 18 N. C. C. A. 207; Roma v. Ind. Comm. of Ohio, 97 Ohio 247, 119 N. E. 461, 2 W. C. L. J. 122, 18 N. C. C. A. 207.

25. Jillson v. Ross, 38 R. I. 145, 94 Atl. 717, 10 N. C. C. A. 992;

In Indiana there is a statutory provision, in civil cases limiting the right of appeal to cases in which the amount involved, exclusive of costs and interest exceeds fifty dollars, with the exception of certain cases, in which a money judgment is not involved. Section 61 of the Compensation Act provides for appeals to be made "under the same terms and conditions as govern appeals in ordinary civil actions." Accordingly where an appeal was taken and the amount involved was forty dollars, the court said: "The amount in controversy, * * * is less than $50, and no question is presented involving any of the enumerated exceptions. An appeal is therefore unauthorized. Under such circumstances it is the duty of this court to take notice of its lack of jurisdiction and dismiss the appeal, notwithstanding the fact that appellee has not raised the question in any form."[26] An appeal lies in Indiana from the final order of the Industrial Board denying an application by the insurer to set aside an approval of a compensation agreement.[27] An appeal also lies from the act of the board approving the fee of a physician.[28]

Where the award is against the contentions of either party, it is conclusive if they fail to exercise their statutory right of appeal.[29]

Where a deceased employee left two children one of whom died before compensation was paid, the insurer appealed from the decree of the court following the Board's award that the payment be made to the surviving child and the administrator of the deceased child. In affirming the decree, the court said: "The Workmen's Compensation Act does not contemplate either in its

Grinnell v. Wilkinson, 39 R. I. 447, 98 Atl. 103, 14 N. C. C. A. 103.

26. Essington v. Bowman, (Ind. App.), 121 N. E. 548, 3 W. C. L. J. 442, 18 N. C. C. A. 207.

27. Frankfort Gen. Ins. Co. v. Conduitt, — Ind. App. —, 127 N. E. 212, 6 W. C. L. J. 25.

28. Kirkhoff Bros. v. McCool, — Ind. App. —, 116 N. E. 439, A. 1 W. C. L. J. 504.

29. Great Northern Ry. Co. v. King, 165 Wis. 159, 161 N. W. 371, 14 N. C. C. A. 88; King v. Sewing Machine Co., 95 N. P. Misc. 676, 159 N. Y. Supp. 910, 14 N. C. C. A. 88; Sweet v. Sherwood Ice Co., 40 R. I. 203, 100 Atl. 316, 14 N. C. C. A. 88.

letter or its spirit, that the insurer may litigate by appeal to this court the proportions of the division of a payment among those claiming to be dependents upon a deceased employee, when the dependents are satisfied and do not appeal and when the insurer cannot by any possibility be affected in its pecuniary responsibility by any modification permitted by law, * * *."[30]

The right of appeal must not be denied arbitrarily, nor too narrow a construction placed upon the limitations of the right. In New York a formal notice of appeal was not filed until after the thirty days required by the act, but within the thirty days a letter had been written by the attorney, the concluding sentence of which read, "In order to be on the safe side I am filing this notice of appeal." The commission declined "to make any statement of its conclusions of fact and rulings of law as required to be done within 30 days after taking an appeal, for the reason that the appeal itself was not served within 30 days from the service of the notice of the award." The court, in holding that the commission should consider the closing sentence of the letter as a notice of appeal and in remanding the case to the commission, said: "The letter does state that the writer thereof is thereby filing an appeal. It should therefore be regarded as a notice of appeal. Accordingly the commission should make a statement of its conclusions of fact and rulings of law."[31]

Once the right of appeal be definitely lost, subsequent decisions of higher courts may not revive the right. An employee suffered injuries, from which he died, upon a vessel lying in navigable waters. An agreement was made for compensation and a number of payments made. Subsequently in another case before the United States Supreme Court, it was decided that admiralty had the jurisdiction of injuries occurring on navigable waters, and the employer refused to make further payments. The claimant filed a petition in the superior court and a decree was entered in accordance with the petition. On the insurer's appeal from the superior court's decree the court said: "It had no right to appeal

30. In re Janes, 217 Mass. 192, 104 N. E. 556, 4 N. C. C. A. 552.

31. Prendergast v. Berrian Bros. et al., 184 N. Y. App. Div. 240, 171 N. Y. Supp. 700, 18 N. C. C. A. 212, 2 W. C. L. J. 826.

from the decree of the superior court. The Workmen's Compensation Act has a procedure all its own, * * *. Its. provisions are explicit that there can be no appeal from a decree of the superior court entered into upon a memorandum of agreement approved by the board * * * 'there shall be no appeal * * * where the decree is based upon * * * a memorandum of agreement.'[32] * * * The merits of that decree cannot be examined in this procedure.''[33]

The Texas Act provides that a disputed claim shall be determined by the Board, but "any interested party who is not willing and does not consent to abide by the final ruling and decision of said board on any disputed claim may sue on such claim * * * in some court of competent jurisdiction, and the board shall proceed no further toward the adjustment of such claim."[34] Where a party has not affirmatively expressed his unwillingness to abide by the board's decision, he cannot in the event of an unfavorable decision of the board set up that he has not expressed his willingness to abide by its decision. "It will not be permitted to remain quiescent, and speculate on the probable decision of the board, and, if unfavorable, be heard to say it is not binding upon it, because it never expressed its consent to abide by the board's decision."[35]

Where a default had been granted in Illinois, and the motion of the defendant to vacate the judgment denied, the court on appeal said that, "The general rule in regard to vacation of judgments is that a motion to set aside a default and for leave to plead to the merits is addressed to the sound legal discretion of the trial court, but if there is an abuse of such discretionary authority this court will interfere on appeal." Citing Culver v. Brinkerhoff, 180 Ill. 548, 54 N. E. 585.[36]

32. Part 3, Sec. 11. Massachusetts Compensation Act.

33. Dempsey's Case 230 Mass. 583, 120 N. E. 75, 2 W. C. L. J. 640, 18 N. C. C. A. 224.

34. Part 2, Section 5, Texas Compensation Act.

35. General Accident, Fire & Life Assurance Corp. v. Evans, — Texas Civ. App. —, 201 S. W. 705, 1 W. C. L. J. 1148, 18 N. C. C. A. 206; Tex. Employers' Assur. Assn. v. Roach, — Tex. Comm. of App. —, 222 S. W. 159, 6 W. C. L. J. 400.

36. McMurray v. Peabody Coal Co., 281 Ill. 218, 118 N. E. 29, 1 W. C. L. J. 324.

Where issues are tried and determined by the commission there is a final hearing which is reviewable on appeal.[37]

§ 559. **Manner of Taking Appeal.**—In appeals from awards of commissions or judgments of courts having original jurisdiction in compensation cases, it is of course necessary to examine carefully the express provisions of the act bearing thereon, and also the rules relating thereto that have been adopted by the court, commission or board under its general power, and then follow explicitly the provisions of the act and the rules adopted in pursuance thereto. Otherwise the practitioner will be likely to find that his client has been deprived of the privilege of having his case reviewed by a higher tribunal.

Under Section 60 of the Indiana Act the board has no power to review an award made by the full board,[38] and where the board granted a review after the award had been made by a full board, and the award made upon rehearing was identical with the original award, the adverse party filed an appeal within 30 days following the second award. The court held that, as the board had no power to grant the review, the time for appeal began to run at the time of the original award, hence was not filed within 30 days, and the court dismissed, the appeal.[39]

Where, on appeal in compensation proceedings, there is a failure of the appellant to file a brief in accordance with the rules of the court, the appeal may be dismissed.[40]

But where the appellee had also failed to make his brief conform to the rules of the court, the court said that: "In view of the fact that the procedure indicated by that act has not been

37. Johnstad v. Lake Superior Team & Transfer Co., — Wis. —, 162 N. W. 659, B 1 W. C. L. J. 1676.

38. Kingan & Co. v. Buford, 64 Ind. App. —, 116 N. E. 754, 18 N. C. C. A. 209.

39. Kokomo Steel & Wire Co. v. Griswold, 64 Ind. App. —, 117 N. E. 265, 18 N. C. C. A. 209.

40. Essington v. Bowman, (Ind. App), 121 N. E. 548, 18 N. C. C. A. 219, 3 W. C. L. J. 442; Davis v. State Indus. Comm., (Okla.), 172 Pac. 638, 2 W. C. L. J. 130, 18 N. C. C. A. 219; McGarry et al. v. Indus. Comm. 290 Ill. 577, 125 N. E. 318, 5 W. C. L. J. 372.

followed by appellee, appellant's briefs will be treated as sufficient to present the questions which she seeks to have determined."[41]

The Supreme Court of California has held that the legislature under the California constitution could not confer judicial power upon the commission that would enable it to fix and enforce liabilities in favor of the employee against persons other than his immediate employer.[42] But where an award was made against the immediate employer, who was a sub-contractor, and also against the general contractor and the insurance carrier of the general contractor, the failure of the general contractor and insurance company to appeal within the statutory time took away their defense. "Section 84 provides for the only review in the courts of such an award, a proceeding in the Supreme court or District Court of Appeals inaugurated within 30 days after the proceeding is terminated before the commission, 'for the purpose of having the lawfulness of the original order, decision or award or the order, decision or award on rehearing inquired into and determined,' * * * In Section 73 it is provided that all orders, rules, and regulations, findings, decisions and awards 'shall be conclusively presumed to be reasonable and lawful, until and unless they are modified or set aside by the commission or upon review by the courts in this act specified and within the time and in the manner herein specified.' * * * The award became absolutely final when they failed to ask for any rehearing before the commission, and failed to ask for any review by this court or the District Court of Appeal within the time allowed by the act."[43] In the above case the court granted a writ of mandamus to compel the sheriff to enforce the judgment on the award.

41. Walker v. Chicago I. & L. Ry. Co., 64 Ind. App. —,117 N. E. 969, 18 N. C. C. A. 218, 1 W. C. L. J. 362.

42. Sturdivant v. Pillsbury et al., 172 Cal. 581, 158 Pac. 222, 13 N. C. C. A. 845; Carstens v. Pillsbury et al., 172 Cal. 572, 158 Pac. 218 13 N. C. C. A. 845.

43. Thaxter v. Finn, Sheriff, 178 Cal. 270, 173 Pac. 163, 2 W. C. L. J. 431.

Where an attorney presented copies on file with the Board, to the Superior court with the statement that " he wishes to appeal to the Supreme Judicial Court from the decision of the Industrial Accident Board" the court said: "That was not an appeal to this court. The Workmen's Compensation Act makes no provision for an appeal from a decision of the Industrial Accident Board to this court, but for an appeal to this court only from a decree of the Superior court." In the same case, on the date of the decree of the superior court the attorney filed in the superior court a paper entitled "Objections to Entry of Decree by said Superior Court." The court said, that "This paper was not either in form or substance an appeal from the decree," and the court further held that the fact that the judge of the superior court believed the paper to be an appeal and filed a memorandum to that effect did not change the effect of the paper. The court said: "The judge of the superior court had no power to convert a paper which was in no sense an appeal from the decree into such an appeal. * * * An appeal not taken according to law is not rightly before us and cannot be considered." [44]

Section 19, paragraph (f) of the Illinois act provides that the writ of certiorari "shall be issued by the clerk of such court upon praecipe." And where no praecipe was ever filed with the circuit clerk for such a writ, and no service had upon the parties as is further provided in the same section, the court said that, "The method of review by the circuit court being statutory, the circuit court could only review the question raised in this record by the method pointed out by the statute." [45]

The court in an Oregon case indicates the procedure on appeal from the award of the commission as follows: "The State Industrial Commission not being a judicial tribunal, a re-examination of any of its final determinations by a circuit court is inaugurated by procedure in the nature of a writ of review. When the jurisdiction of the cause has thus been secured, it is to be tried

44. Martin's Case, 231 Mass. 402, 121 N. E. 152, 18 N. C. C. A. 221, 3 W. C. L. J. 308.

45. Smith-Lohr Coal Min. Co. v. Ind. Board of Ill., 279 Ill. 88, 113 N. E. 656, 18 N. C. C. A. 222.

de novo as upon appeal, where the facts may be considered and determined by a jury in the discretion of the court, this showing that evidence may be given at such hearing."[46] But the lower court may not on appeal hear the case as an original damage action and ignore the limitations and schedules of the compensation act.[47]

It is not necessary to make exceptions, nor is the appeal taken by exceptions. As stated by the court in a New York case: "There is no provision of the statute or rule of this court requiring the filing of exceptions * * * and unless otherwise provided the appeal to this court should bring up the whole case, to be heard upon the record of the commission and the briefs and arguments submitted by the respective parties."[48] And in Massachusetts: "The Act does not contemplate the allowance of exceptions, and they must be dismissed. The case is properly here on appeal. In re American Mutual Liability Ins. Co., 215 Mass. 480, 102 N. E. 693, 4 N. C. C. A. 60."[49]

In Massachusetts the court in considering a point upon which no exceptions were taken said: "The insurer contends that the finding of the board, to the effect that the father and mother were each partially dependent in equal degree upon the wages of the deceased, is not warranted by the evidence. This point is open on the appeal, although no request was made respecting it, because both the single member in his report and the board on appeal state that one of the questions to be decided is whether the claimants were dependent upon the earnings of the deceased employer."[50]

46. Raney v. State Ind. Acc. Comm, 85 Ore. 199, 166 Pac. 523, 18 N. C. C. A. 233.

47. Miller v. State Ind. Acc. Comm., 84 Ore. 507, 165 Pac. 576, 18 N. C. C. A. 241.

48. Kenny v. Union Railway Co., 166 App. Div. 497, 152 N. Y. Supp. 117, 8 N. C. C. A. 986.

49. In re McNicol et al., 215 Mass. 497, 102 N. E. 697, 4 N. C. C. A. 522.

50. Dembinski's Case, 231 Mass. 261, 120 N. E. 856, 18 N. C. C. A. 213, 3 W. C. L. J. 151.

In Illinois it has been held that no bill of exceptions is necessary to preserve the rulings of the trial court in certiorari proceedings as the orders of the trial court are a part of the record.[51]

Contra to the holding in the above mentioned states is the holding in Iowa, where the court said: "Nothing in the statute differentiates this judgment from judgments as to which an exception is required, in order that appellate review may be had. Be the function of the district what it may in entering judgment upon the finding of the commissioner or the award of the committee, it may not be complained of after it is entered by one who made no objection to it below after it was entered. It follows appellants may have no relief here if they took no exception below to the judgment, which formulated and made effective that of which they now complain."[52]

On reviewing the commission's decision the Wisconsin Supreme Court said that, "Recourse may be had to the memorandum of decision made by the Industrial Commission as a basis for the more formal findings of fact."[53]

An appeal under the Vermont Act from the Commission to the Supreme Court within the time allowed for appeal to the circuit court does not invalidate the appeal.[54]

In a California case the court said: "The petition in substance and effect is based upon a want of evidence sufficient to warrant the conclusion of the commission that the petitioners' disability terminated Sept. 8th, 1919. No attempt is made to state "all the material evidence" relative to this point. The petition therefore fails to comply with the rules promulgated by the Supreme Court (subd. 4, rule 26).[55]

51. City of Pana v. Ind. Board, 279 Ill. 279, 116 N. E. 647, 18 N. C. C. A. 213.

52. Keys et ux. v. American Brick & Tile Co., (Iowa), 170 N. W. 295, 18 N. C. C. A. 213, 3 W. C. L. J. 469.

53. Manitowoc Boiler Works v. Ind. Comm. of Wis., 165 Wis. 592, 166 N. W. 172, 18 N. C. C. A. 233.

54. O. Boyle v. Parker Young Co., — Vt. —, 112 Atl. 385, (1921).

55. Pettit v. Indus. Acc. Comm. of Cal., — Cal. App. —, 192 Pac. 109, 6 W. C. L. J. 646.

So a petition for certiorari to review an order of the commission was denied where the petitioner neglects the privilege under the same rule of filing a reply to the commission's answer showing that the findings complained of are sufficiently supported by the evidence.[56]

Reference in the appeal of the employer and insurer to the testimony taken by the Commissioner of Industries in proceedings under the Vermont Workmen's Compensation Act, making the transcript thereof part of the appeal, does not bring the transcript before the supreme court and therefore the court cannot say that the commissioner's finding was erroneous.[57]

Under the Illinois practice where a petition for a writ of error or the accompanying abstract is incomplete or incorrect, the respondent should reply to the petition, and file an additional abstract, as permitted by rule 43 (125 N. E. VII). So as to prevent an award of the writ without apparent good cause.[58]

Motions to correct a record should be presented to the Compensation Commissioner within a reasonable time, two weeks, and upon his refusal to correct it, error based upon such refusal should be incorporated in the reasons for appeal filed in the superior court. Evidence relevant to corrections should be filed with the commission within a reasonable time and the motion should be filed with the decision and together with the evidence, be certified by the commissioner.[59]

Where an employee wrote to the Industrial Board requesting blanks and information as to procedure, since he desired to appeal this is a sufficient claim for review within the statutory provisions requiring claim to be made within seven days, but requires no formality in the claim.[60]

56. Western Indemnity Co. v. Indus. Acc. Comm. of Cal., — Cal. App. —, 192 Pac. 109, 6 W. C. L. J. 645.

57. Gates v. A. G. Dewey Co., — Vt. —, 111 Atl. 446, 6 W. C. L. J. 719.

58. Sesser Coal Co. v. Indus. Comm., — Ill. —, (1921), 129 N. E. 536.

59. Atwood v. Connecticut Light & Power Co., — Conn. —, (1921), 112 Atl. 269.

60. Jones v. St. Joseph Iron Works, — Mich. (1920), 180 N. W. 374, 7 W. C. L. J. 315.

§ 560. **Conditions Precedent to an Appeal.**—Final action must be taken by the commission or the court of original jurisdiction before an appeal may be taken. "A writ of certiorari will not lie to an intermediate order, but only to a final decision or judgment; and a matter pending in the district court cannot be brought into this court for review by such writ until the district court has made its final decision thereon."[61]

In Illinois the Supreme Court has defined the final action requisite to an appeal as follows: "A judgment or decree is final and appealable only when it terminates the litigation between the parties on the merits of the case, so that when affirmed, the court below has only to proceed with the execution of the judgment or decree."[62]

An order denying a motion to dismiss an appeal is a final order which is appealable.[63]

And where the commission definitely held that there was no ground for the allowance of further compensation upon the ground of no loss of earning capacity the court held that such holding was a final order which could be reviewed.[64]

In an Indiana case an indefinite medical allowance was appealed from and the court said: "As to this contention it is sufficient to say that no final award is made by judgment as to such matters and that the appeal to this court in regard thereto is premature. The portion of the judgment referred to cannot be enforced as it now stands, and before any effective judgment can be rendered as to the matters therein referred to, it is clear that a definite award must be made designating amounts and the person or persons to whom payable."[65]

61. State ex rel. Klemer v. Dist. Court of Rice Co., 132 Minn. 100, 155 N. W. 1057, 14 N. C. C. A. 93.

62. Peabody Coal Co. v. Ind. Comm. et al., 287 Ill. 467, 122 N. E. 843. 4 W. C. L. J. 30.

63. Enneberg v. State Acc. Comm., 88 Ore. 436, 167 Pac. 310, 18 N. C. C. A. 228.

64. Johnstad v. Lake Superior Terminal & Transfer Ry. Co., 165 Wis. 499, 162 N. W. 659, 14 N. C. C. A. 94.

65. Garrett-Callaghan Co. v. Ind. Acc. Comm. of Cal. 171 Cal. 334, 153 Pac. 239, 15 N. C. C. A. 128.

Where an insurer fails to comply with an award of the Industrial Board, the injured employee is entitled to an award in a lump sum for the compensation already due, and judgment for weekly installments during the balance of the compensation period; and such judgment is a final judgment from which an appeal may be taken.[66]

Failure to sue within the statutory time limit after notice under the Texas Act, is an abandonment of the party's right to appeal.[67]

It is not necessary to file a motion for a new trial after a final award and before appealing in Indiana,[68] but in Michigan it is necessary to have the decision of the committee reviewed by the board before appealing.[69] In Colorado a request for a rehearing is a condition precedent to taking an appeal.[70] Under the Minnesota act it has been held that it is not necessary to request the amendment or modification of the award as a condition precedent to bringing it up in the Supreme court.[71]

In New York the practice of the appellate court requires that following the death of the plaintiff, a substitution must be had of the representative of the estate before an appeal can be heard.[72] Under the Nebraska Act a notice of an intention to appeal

66. U. S. F. & G. Co. v. Parsons, — Tex. Civ. App. —, (1920), 226 S. W. 419.

67. Miller's Indem. Underwriters v. Hayes, — Tex. Civ. App. —, (1921), 230 S. W. 833.

68. Union Sanitary Mfg. Co. v. Davis, 63 Ind. App. 548, 114 N. E. 872, 14 N. C. C. A. 95; Campbell-Smith-Ritchie Co. v. Souders, — Ind. App.—, 115 N. E. 354, A 1 W. C. L. J. 526.

69. Shewe v. New York Central R. Co., 192 Mich. 170, 158 N. W. 337, 14 N. C. C. A. 94.

70. Stacks v. Industrial Comm. of Col., 174 Pac. 588, 18 N. C. C. A. 203, 2 W. C. L. J. 756; Midget Consolidated Gold Mining Co. v. Indus Comm.,—Colo.—, 193 Pac. 493, 7 W. C. L. J. 26.

71. State ex rel. Anseth v. Dist. Court Koochiching Co., 134 Minn. 16, 158 N. W. 713, 14 N. C. C. A. 92.

72. Waite v. E. W. Bliss Co. et al., 173 N. Y. Supp. 686, 3 W. C. L. J; 509, 18 N. C. C. A. 219; O'Esau v. E. W. Bliss Co., 186 N. Y. App. Div. 701 121 N. E. 362, 18 N. C. C. A. 220.

must be filed with the commission within seven days after an award, this provision may be waived by the defendent.[73]

There can be no appeal from an interlocutory order. It has been held that an order granting a hearing de novo was interlocutory. The Pennsylvania Act (Sec. 421) provides that the board shall sustain the referee's award or grant a hearing de novo. Where a hearing de novo was granted the court said, of the referee's conclusion: "The conclusion * * * comprehends a mixed finding of fact and law; hence the Compensation board was justified in treating the appeal to it as involving a question of fact and in granting a hearing de novo. * * * We agree with the court below that the order in question is interlocutory."[74]

In New York it has been held that an appeal from a notice of the commission to the employer to pay the present value of a claim into the state fund, was not a decison which was reviewable. The court said: "The Appellate Division considered the notice sent out by the cashier as a determination or decision and reversed it. The attorney general appeals to this court. Section 23 * * * permits an appeal from an award or decision of the commission. This notice was neither. The appeal, therefore, presents nothing which this court can review and must be dismissed."[75]

Under the Michigan Act, "when the time fixed by statute expires without any claim of review filed by either party, the award stands as the decision of the Industrial Accident Board. Only in exceptional cases and for some special reason the board may, upon a meritorious application showing in its judgment sufficient cause for further delay, grant an extension of time. The arbitrary right of parties to file a claim of review is limited to 7 days from the date of filing the award."[76]

73. Mucha v. Morris & Co., — Neb. —, 179 N. W. 500, 6 W. C. L. J. 703.

74. Mooney v. Lehigh Valley R. Co., (Pa.), 104 Atl. 624, 2 W. C. L. J. 942, 18 N. C. C. A. 228.

75. Sperduto v. New York Interborough Ry. Co., 226 N. Y. 73, 123 N. E. 207, 4 W. C L. J. 123.

76. Brunette v. Quincy Mining Co., — Mich. —, 163 N. W. 1013, A. 1 W. C. L. J. 879; Bloomington D. & C. R. Co. v. Indus. Bd., — Ill. —, 114 N. E. 511, A. 1 W. C. L. J. 334; Richmond Cedar Works v. Harper, — W. Va.

Under the Indiana Act when the first hearing was not held before the full board, a review may be had by the full board upon application.[77] And the time of perfecting an appeal runs from the time of the making of an award by the full board, since the board cannot review an award by the full board.[78]

It has been held that the provision of the compensation act of Illinois requiring a suit by certiorari to be commenced within 20 days of the receipt of notice of the decision of the board, was complied with where a praecipe for the writ had been filed, and the court can thereafter issue alias writs to replace those lost before service upon the commission or the employee, though there is no express provision in the statute authorizing alias writs.[79]

Where a superior court had no jurisdiction an appeal will not lie therefrom to the Supreme Judicial Court, because the lower court's decree was invalid, and no effect will be given to it.[80]

The term "final action" as used in section 1465-90, Gen. Code (as added by Act Feb. 26, 1913), (103 Ohio Laws, p. 88, Sec. 43) has relation to the question whether or not the Industrial Commission has jurisdiction to allow compensation to a claimant out of the state insurance fund, and under the provisions of that section, as a condition precedent to the right of claimant to file his appeal in the court of common pleas, there must be a denial of his right to participate at all in such fund, based upon one of the jurisdictional matters enumerated in the section.[81]

Where no briefs are filed, as required by rule 7 of the Supreme Court of Oklahoma the appeal will be dismissed for want of prosecution.[82]

—, (1921), 106 S. E. 516; Highfield v. Duffy, — Ind. App. —, 115 N. E. 347, A. 1 W. C. L. J. 533.

77. Kingan & Co. v. Buford — Ind. App. —, 116 N. E. 754, A. 1 W. C. L. J. 468.

78. Kokomo Steel & Wire Co. v. Griswold, — Ind. App. —, 117 N. E. 265, A 1 W. C. L. J. 507.

79. Oriental Laundry Co. v. Indus. Comm., — Ill. —, (1920), 127 N. E. 676, 6 W. C. L. J. 287.

80. Sciola's Case, — Mass. —, (1920), 128 N. E. 666, 7 W. C. L. J. 72.

81. Snyder v. State Liab. Board of Awards, — Ohio —, 114 N. E, 268, B. 1 W. C. L. J. 1468.

82. Mullen v. Mitchell, — Okla. —, (1921), 197 Pac. 171.

§ 561. **Matters Considered on Appeal.**—As was observed from the cases cited and discussed in the section on findings, Ante, findings of fact by the commission are not reviewable save in the exceptions noted. It has been held that a court might as a matter of law determine if the award was in accord with the findings. Thus, in Colorado, an award was made for total loss of use of one eye, which award on rehearing was reduced by the board. The district court on appeal changed the award to conform to the facts, and the Supreme court in disposing of the case said: "The district court held that the award of the commission on the last hearing was 'unlawful and unreasonable;' that the commission acted without and in excess of its powers; and that the findings of fact * * * * do not support the award.' It was clearly within the powers of the court to determine, as a matter of law, that the award was not in accord with the findings, and, having done so and made an award which is supported by the findings, there is no reason for disturbing the judgment."[83]

Under some of the acts, and the decisions rendered thereunder, the courts on appeal have no power to grant relief, even though the findings of fact are erroneous. As the court in a Pennsylvania case said, "Section 409 of the act of June 2, 1915 (P. L. 736, 751), provides that 'the board's findings of fact shall in all cases be final.' This provision comprehends all instances where the board either adopts the findings of the referee or makes its own findings on a hearing de novo, and as recently ruled by us in Poluskiewicz v. P. & R. C. & I. Co., 257 Pa. 305, 307, 101 Atl. 638, if the board errs in its findings, the 'courts can grant no relief.' "[84]

In the above case the referee disallowed the claim, holding that the employer and deceased were engaged in interstate commerce. After the referee's action had been upheld by the board and the board's decree affirmed by the lower court, the Supreme Court held that it had no power to disturb the findings of fact. In a

83. Industrial Comm. of Colorado et al. v. Johnson, 64 Colo. 461, 172 Pac. 422, 2 W. C. L. J. 43.

84. Messinger v. Lehigh Valley R. Co., 231 Penn. 336, 104 Atl. 623, 2 W. C. L. J. 940, 18 N. C. C. A. 231.

California case such finding was held to be a conclusion of law which could be reviewed,[85] and where the evidence is undisputed the findings of the board becomes a question of law and is reviewable for error.[86]

The court in Illinois states what matters are considered by it and also by the inferior court on appeal, "The circuit court in that proceeding has power to review only questions of law presented by the record * * * * Our powers of review are limited to a determination from the facts recited in the decision of the Industrial Board, whether that body acted within its powers in making the award."[87] In Oregon the circuit court, after a trial without jury of a case in which the board had refused compensation, allowed compensation. The employer appealed and the court held the only question before it was whether the findings of fact, "When supported by any evidence uphold the judgment rendered, which must conform to the provisions of the statute governing such a case."[88] In the above case a trial de novo was permitted as provided in Section 32 of the Oregon Act.

In Iowa the courts are not bound by the findings of fact which go to the jurisdiction, as stated by the court, "Where the only question presented is whether or not the jurisdictional fact exists, entitling the person to be heard before the commissioner, we have a right to review the action of the commissioner even to the extent of finding the fact to be other than the commissioner found it. Upon this point see Griffith v. Cole Bros., 183 Iowa, 415, 165 N. E. 577, L. R. A. 1918F, 923, and cases therein cited."[89]

85. Hines D. G. R. R. v. Indus. A. C. of Cal., — Cal. —, 192 Pac. 859, 6 W. C. L. J. 628; Reid v. Automatic Electric Washer Co., — Ia.—, 179 N. W. 323, 6 W. C. L. J. 662.

86. Cayll v. Indus. Comm., — Wis. —, (1920), 179 N. W. 771, 7 W. C. L. J. 165; Lupoli v. Atlantic Tubing Co., — R. I. —, (1920), 111 Atl. 766, 7 W. C. L. J. 356; Stahl v. Watson Coal Co., — Pa. —, (1920), 112 Atl. 14.

87. Munn et al. v. Ind. Board of Ill., 274 Ill. 70, 12 N. C. C. A. 652, 113 N. E. 115; Snyder v. Indus. Comm., — Ill. —, 130 N. E. 517; Hackley-Phelps-Bennell Co. v. Indus. Comm. — Wis. —, (1920), 179 N. W. 590, 6 W. C. L. J. 724.

88. Raney v. State Ind. Acc. Comm., 85 Ore. 199, 166 Pac. 523, 18 N. C. C. A. 23; Lezala v. Indus. Comm., — Wis. —, 175 N. W. 87.

89. Bidwell Coal Co. v. Davidson, (Iowa), 174 N. W. 592, 5 W. C. L. J. 71.

While in Indiana the court said, "The Industrial Board's findings of fact are conclusive on this court only when sustained by the evidence;"[90] but "this court must accept the facts so found as true, unless the evidence is of such a conclusive character as to force a contrary conclusion. Indianapolis etc. Co. v. Fitzwater, 121 N. E. 126; Bloomington-Bedford Stone Co. v. Phillips, 116 N. E. 850; In re Myers, 116 N. E. 314; Hege v. Thompkin, 121 N. E. 677. However, in order to reach a contrary conclusion, we may not weigh the evidence, nor may we disregard any reasonable inferences which the Industrial Board may have drawn from the facts which the evidence tends to establish."[91]

The variance between the above cases again brings clearly before the practitioner the importance of examining the acts with respect to the provisions on appeal and the matters which may there be considered.

The court in a New Jersey case says: "The right of the Supreme court to review a proceeding under the Workmen's Compensation Act is limited to questions of law, and it cannot review determinations of fact if there is evidence to support them."[92] And in Connecticut, "The right of the trial court to correct the findings of the commissioner is similar to that exercised by us upon a proper appeal over the finding of a trial court. And our authority upon appeal from the decision of the trial court, or upon a reservation in a compensation case, does not differ from that exercised by us in the ordinary appeal for errors in the finding of the trial court. "The trial court does not retry the facts. It decides the appeal upon the findings as made by the commis-

90. Centlivre Beverage Co. v. Ross, (Ind. App.) 125 N. E. 220, 5 W. C. L. J. 212.

91. Swing v. Kokomo Steel & Wire Co., (Ind. App.) 126 N. E. 471, 5 W. C. L. J. 380; Choctaw Portland Cement Co. v. Lamb.,—Okla.—, (1920), 189 Pac. 750, 6 W. C. L. J. 207; Big Muddy Coal & Iron Co. v. Indus. Bd., — Ill. —, 116 N. E. 662, A. 1 W. C. L. J. 329. But see Shaws Dependents v. Fred v. Harms Piano Co., — S. Dak. —, 184 N. W. 130.

92. Brinsko's Estate v. Lehigh Valley R. Co. of New Jersey, 90 (N. J. L.)658, 102 Atl. 390, 1 W. C. L. J. 431, 18 N. C. C. A. 232; Lundy v. George Brown & Co., 93 N. J. 107, 108 Atl. 252, 5 W. C. L. J. 294; Leitz v. Labadie Ice Co., — Mich. —, (1920). 179 N. W. 291, 6 W. C. L. J. 961.

sioner, unless the appeal assigns as error the finding or omission to find any facts, and the court finds that facts have been found or omitted, which if found, in accordance with the evidence, would affect the result."[93]

As to the evidence which will be considered by the court on appeal, the following was said in an Illinois case: "It has been repeatedly held that it is not within the province of the courts to pass upon the weight of the evidence heard by the board. Citing Victor Chemical Works v. Industrial Board, 274 Ill. 11, 113 N. E. 173; Munn v. Industrial Board, 274 Ill. 70, 113 N. E. 110; Parker-Washington Co. v. Industrial Board, 274 Ill. 498, 113 N. E. 976. It is only in cases where it is contended that there is no competent evidence to support the decision of the board that the evidence adduced is reviewed by the courts on the question of law thus raised."[94]

In Indiana where an appeal was taken from an award, and the appellant assigned as error, that the award was not sustained by sufficient evidence and was contrary to law, it held that the assignment that the award was contrary to law presented both questions.[95] While Section 61 authorizes the above general assignment, separate assignments may be made.[96]

93. Swanson v. Latham & Crane, 92 Conn. 87, 101 Atl. 492, 18 N. C. C. A. 205, 233; Strong v. Sonken-Galamba Iron and Metal Co., — Kan. —, (1921), 198 Pac. 182.

94. Schwarm v. George Thomson & Sons, 281 Ill. 486, 1 W. C. L. J. 533, 118 N. E. 95; Commonwealth Edison Co. v. Indus. Bd.,—Ill.—, 115 N. E. 158, A. 1 W. C. L. J. 371; Armstrong v. Oakland Vinegar & Pickle Co.,—Mich.—, 163 N. W. 897, A. 1 W. C. L. J. 867; King v. National Candy Co., —Mich.—, (1920), 180 N. W. 431, 7 W. C. L. J. 318; Stahl v. Watson Coal Co., — Pa. —, (1920), 112 Atl. 14.

95. Union Sanitary Mfg. v. Davis, 63 Ind. App. 548, 115 N. E. 676, 14 N. C. C. A. 91; Walker v. Chicago, I. & L. Ry. Co, 64 Ind. App. 117 N. E. 969, 1 W. C. L. J. 362; Bucyrus Co. v. Townsend et al., 64 Ind. App. —, 117 N. E. 565, 18 N. C. C. A. 214, 1 W. C. L. J. 166; Zeitlow v. Smock, (Ind.), 117 N. E. 665, 11 W. C. L. J. 174; Retmier v. Cruse, (Ind. App.), 119 N. E. 32, 18 N. C. C. A. 214, 1 W. C. L. J. 971; Kramer v. Huntington Steel Foundry Co., — Ind. App. —, (1920), 127 N. E. 284, 6 W. C. L. J. 154; Alexander Box Co. v. Cutshall,—Ind. App.—, (1920), 127 N. E. 286 6 W. C. L. J. 155.

It is the duty of the appellant to "bring to the court a record which affirmatively shows reversible error. * * * A finding of facts, admitting of but one conclusion, viz., a conclusion favorable to him. * * * A finding of facts, though evidentiary in character, cannot take the place of evidence to make effective a challenge of the sufficiency of the evidence."[97]

In another Indiana case the court said that, "In determining the question whether the evidence is sufficient to sustain said award, that evidence alone most favorable to the appellee must be considered."[98] And again, where compensation had been awarded, the question of willful misconduct in the alleged failure to use the proper safety appliance had been decided in the claimant's favor. On appeal the court said, "Whether the conduct of the workman in any circumstances amounts to a willful failure or refusal is a mixed question of law and fact. It involves, first, the determining of the facts from the evidence, including legitimate inferences, which usually is the exclusive province of the board, and, second, the application of the laws as represented by the statute * * * to the facts. In this latter field the action of the board is reviewable by the court on appeal, Inland Steel Co. v. Lambert. 118 N. E. 162. Since the board by its award has determined the issue of willfulness in favor of appellee; this court in reviewing the action of the board must consider only the evidence that tends to support the award, and with such evidence only those permissible inferences in harmony therewith."[99]

In an Illinois case a miner lost the sight of an eye, and was awarded compensation. The evidence showed that the loss due to the accident was 35% and the total loss due to disease. The court on appeal held that there was no evidence to sustain the award as granted, and said: "The courts cannot determine the weight of

96. Bimel Spoke & Auto. Wheel Co. v. Loper, 64 Ind. App. —, 117 N. E. 527, 18 N. C. C. A. 213, 1 W. C. L. J. 56.

97. Raynes v. Staats-Raynes Co., (Ind. App.), 119 N. E. 809, 18 N. C. C. A. 214, 2 W. C. L. J. 485.

98. Haskell & Barker Car Co. v. Brown, 64, Ind. App. —, 117 N. E. 555, 18 N. C. C. A. 232, 1 W. C. L. J. 48.

99. Haskell & Barker Car Co. v. Kay, (Ind. App.), 119 N. E. 811, 18 N. C. C. A. 232, 2 W. C. L. J. 466.

the evidence on controverted questions of fact, but can examine the record only to determine whether there is competent evidence to sustain the award. Citing Pekin Cooperage Co. v. Ind. Comm., 285 Ill. 31, 120 N. E. 530; Sulzberger & Sons Co. v. Ind. Comm., 258 Ill. 223, 120 N. E. 535; Western Electric Co. v. Ind. Comm., 285 Ill. 279, 120 N. E. 774; Lefens v. Ind. Comm., 286 Ill. 32, 121 N. E. 182; Heed v. Ind. Comm., 287 Ill. 505, 122 N. E. 801. The question here, therefore, is whether there is any competent evidence in the record sustaining the conclusion of the Industrial Commission that the total loss of sight of the eye was due to the accident * * *. If a further hearing should be had, the evidence may justify a different conclusion; but the evidence on the hearing which was had, does not sustain the award for permanent total loss of the eye as a result of the accident."[1]

A writ of error to the supreme court brings up the record at the time of the issuance of the writ. A recent Illinois case gives the reasons why an amendment by the commission after the writ of error was filed cannot be considered by the supreme court or the circuit court. The court said: "It is also contended by plaintiff in error that the circuit court erred in not amending its judgment to conform to the amendment of the Industrial Commission, which suspended payment of compensation until Bush should submit to an operation for hernia. That question was not in the record at the time of the issuance of a writ of error in this case, and is not now before this court. On the petition of the plaintiff in error the writ of error was made a supersedeas. A writ of error brings up the entire record, as does an appeal. People v. Wright, 284 Ill. 339, 120 N. E. 242. A supersedeas operates to suspend all further action of the trial court touching the matter, as does the perfecting of an appeal. Tock Island Nat. Bank v. Thompson, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. Rep. 137; Smith v. Chytraus, 152 Ill. 664, 38 N. E. 911. The amendment of the award by the Industrial Commission was made, and the petition to have the circuit court amend its judgment to conform thereto was filed, after the writ of error was granted and made a supersedeas in

1. Spring Valley Coal Co. v. Ind. Comm., 289 Ill., 315, 124 N. E. 545, 5 W. C. L. J. 64.

this case, and the case thereby brought to this court. By means of the writ of error and supersedeas, therefore, the circuit court was without jurisdiction to enter any order in the case whatever, and the circuit court did not err in so holding. People v. Wiley, 284 Ill. 186, 119 N. E. 965; People v. Pam, 276 Ill. 181, 114 N. E. 504; City of Chicago v. Lord, 281 Ill. 414, 118 N. E. 65.

"It also appears from the record that the question of the amendment of the award by the commission on the ground stated is pending on a writ of certiorari in the circuit court, a petition for which was filed after the original cause was brought to this court by writ of error. That question will therefore be passed upon by that court under the writ of certiorari."[2]

Matters not decided by the lower court or commission are not up for decision on appeal. Part 3, section 17, of the Michigan Act provides that the failure of an employee to report an accident to the Board, "shall be punished by a fine of not more than fifty dollars for each offense." The board, in considering a case, held that the employer was liable for the fine, but made no order directing the fine to be assessed. The appellant asked for a reversal of the penalty. The court held that the question of the penalty was not one for decision inasmuch as the board had made no order.[3]

In a Washington case compensation was allowed by the Superior court and the commission was directed to fix the compensation according to law. The commission failed to act and the superior court denied the claimant's application for an order compelling the commission to act. The injury was a hernia, and the commission had adopted a rule requiring an operation in hernia cases. On appeal the court said: "It (commission) cannot establish rules in direct conflict with the provisions of the act or defeat the mandate of a court of competent jurisdiction. * * * When it was finally determined that appellant's injury constituted a

2. O. W. Rosenthal Co., v. Industrial Comm. et al. 290 Ill. 323, 125 N. E. 250, 5 W. C. L. J. 196.

3. Gaffney v. Goodwillie, 203 Mich. 591, 169 N. W. 849, 3 W. C. L. J. 315, 18 N. C. C. A. 225; Burns v. Millers Mutual Casualty Co., — Minn. —, 178 N. W. 812, 6 W. C. L. J. 461; Fischer v. W. F. Priebe & Co. — Ia. —, 160 N. W. 48; Failure to plead rule. Standard Cabinet Co. v. Landgrave, — Ind., App. —, 128 N. E. 358.

permanent partial disability, the only course open to the commission was to proceed to fix the amount of the award in a lump sum against the accident fund."[4]

Supplemental proof will not be considered by the court on appeal in West Virginia, That court has said: "Upon the second question, the right of this court to read and consider the supplementary proof, conceding it necessary in order to establish the dependency of the claimant, all that need be said is that no rule of law allows this court upon this review to go outside of the proof upon which the state compensation commissioner based his conclusion to reject the claim. To do otherwise and decide the case upon matters not considered by him would be grossly unfair and violative of the reasonable rules of procedure obtaining in this and other similar cases."[5] But the court may order the commissioner to permit the presenting of additional evidence where it seems necessary to determine the real merits of the case.[6] Some states permit supplemental proof. The Oregon Supreme court said that, "We conclude that there was no error in making the hearing practically a *de novo* trial."[7]

And the Maryland Supreme court, construing the act of that state, said: "To deny to one attacking the decision upon appeal the right to introduce any proper oral evidence would so clog and hamper the exercise of his rights under the act as to render them of little value."[8]

An award will not be reversed because of the admission of hearsay or incompetent evidence where there is sufficient competent evidence to form the basis of an award.[9] The court in an Indiana case said: "Appellant also bases error on the admission of certain evidence. In doing this it seeks to apply the strict rules in

4. Kline v. Ind. Ins. Comm., 101 Wash. 365, 172 Pac. 343, 2 W. C. L. J. 167, 18 N. C. C. A. 225.

5. Poccardi v. Ott, 82 W. Va., 497, 96 S. E. 790, 2 W. C. L. J. 949, 18 N. C. C. A. 233.

6. Foughty v. Ott, 80 W. Va. 88, 92 S. E. 143, 14 N. C. C. A. 100.

7. Miller v. State Ind. Acc. Comm., 84 Ore. 507, 165 Pac. 576, 18 N. C. C. A. 233.

8. R. H. Frazier & Son v. Leas, 127 Md. 572, 96 Atl. 764, 14 N. C. C. A. 101.

that regard, adopted and enforced in courts of law. This should not be done. The Industrial Board is not a court, but an administrative body and should not be held to the same strict rules with respect to the admission of evidence. The general rule seems to be that the admission of incompetent evidence by such boards will not operate to reverse an award, if there be any basis in the competent evidence to support it. * * * * This rule is in accord with the spirit of our statute with reference to the powers and duties of the Industrial Board, and the application in the instant case would render any such alleged error harmless."[10]

The exclusion of evidence may also be no ground for reversal.[11] Where the above grounds were a part of the exceptions on which it was sought to have an award reversed the court said: "The remaining questions relate to certain exceptions taken by the claimant to the exclusion of evidence by the committee of arbitration. Although questions of evidence apparent on the record will be considered in accordance with general equity practice, errors in the admission or exclusion of evidence will not be ground for the reversal of a decree, unless necessary to protect the substantial rights of the parties." Citing Pigeon's case, 216 Mass. 51, 55, 102 N. E. 932, Ann. Cas. 1915A, 737."[12] In an Iowa case it was held error not to admit an affidavit of a fellow-employee, then in the army, for corroboration purposes, though it was stated that affadavits are not available for the establishment of vital issues.[13]

Where the objector has developed the testimony, which he later claims to be incompetent, his objections will not be heard. The

9. A. B. Breslauer Co. v. Ind. Comm. of Wis., 167 Wis. 202, 167 N. W. 256, 18 N. C. C. A. 235, 2 W. C. L. J. 189; Kinney v. Cadillac Motor Car Co., 199 Mich. 435, 165 N. W. 651, 18 N. C. C. A. 235, 1 W. C. L. J. 395; Day v. Sioux Falls Fruit Co., — So. Dak. —, (1920), 177 N. W. 816, 6 W. C. L. J. 216.

10. United Paper Board Co. v. Lewis, 64 Ind. App. —, 117 N. E. 276, 18 N. C. C. A. 236.

11. Frankfort General Ins. Co. v. Pillsburry, 173 Cal. 56, 159 Pac. 150.

12. Beckles case, 230 Mass. 272, 119 N. E. 653, 2 W. C. L. J. 278, 17 N. C. C. A. 434.

13. Reid v. Auto. Elec. Washer Co., — Ia. —, 179 N. W. 323, 6 W. C. L. J. 662.

court said, "This testimony not only was not objected to at the time, but it was developed and brought out by counsel who now object to it as incompetent to prove divorce. They cannot now be heard to raise that objection."[14]

And where the proof, upon which the award was based was made up principally of hearsay statements and declarations, the court said, "These statements, however, were either introduced by the insurance carrier itself or were received without objection. The carrier cannot now be heard to claim that such statements were incompetent and have no probative value. 'Nothing is more common than for testimony to be given which is not, in its nature, strictly competent, upon matters about which both parties are conscious that there is no dispute; matters which both fully understand to be true. And such evidence is taken because the adverse party makes no question of the fact it tends to establish. He can never be permitted to say, on appeal, that the fact was not proved, because the evidence offered and received was not competent testimony, and ought to have been objected to and rejected.' Flora v. Carbean, 38 N. Y. 111."[15]

If the record be not lodged in the appellate court in a proper manner, no relief can be had. The court said that, "Under the abstract of the appellee, which has not been met by certification, it would seem that the record was not lodged in the district court in such manner as under the statute to give that court the power to proceed as prayed; * * * *."[16]

In Indiana a claim may be appealed within 30 days but "the statute only provides for an appeal from an award by the full board, Act 1917, p. 155," and an appeal was unauthorized where the record failed to disclose that the award was made by the full board. Nor can an appeal be taken in Indiana from an

14. Smith-Lohr Coal Mining Co. v. Industrial Comm., 286 Ill. 34, 121 N. E. 231, 18 N. C. C. A. 238, 3 W. C. L. J. 250; Steel Sales Corp., v. Indus. Comm., — Ill. —, 127 N. E. 698, 6 W. C. L. J. 303.

15. Hernon v. Holahan et al., 182 App. Div. 126, 169 N. Y. Supp. 705, 1 W. C. L. J. 1120, 18 N. C. C. A. 238; Steel Sales Corp., v. Indus. Comm., — Ill. —, 127 N. E. 698, 6 W. C. L. J. 303.

16. Keys v. American Brick & Tile Co., (Iowa), 170 N. W. 295, 3 W. C. L. J. 468, 18 N. C. C. A. 238.

order approving or disapproving attorneys fees,[17] though an order allowing and approving a physician's claim for services may be appealed.[18]

The amount of the award is a discretionary matter and will generally not be disturbed on appeal. In Illinois when the amount of the award is within the statutory limitation it will not be reviewed except for fraud.[19] In New York, the court, in refusing to change the amount of the award, said that, "while * * * * some difference of opinion may exist as to the proper method of compensation, we are satisfied that the award does no injustice to the appellants, and is practically correct."[20] In Washington the court said that, "the amount of the award upon a proper classification is a matter resting in the broad discretion of the department and will not be interfered with, 'unless possibly, their decision might be reviewed by the courts where they are charged with capricious or arbitrary actions in fixing the amount of the award,' citing Sinnes v. Goggett et al., 80 Wash., 673, 142 Pac. 5."[21]

The amount of the award as made by the commission is conclusive. Thus in New York, the award was "of $4.32¾ weekly to the father and mother," and the notice of award sent to the parties in interest stated that the award was $4.32¾ to the father and $4.32¾ to the mother. An appeal was taken on the assumption that the amount of the award was $8.655 in equal parts to the father and mother. The court said: "As the award is conclusive and the total amount which the insurance carrier is bound to pay is $4.32¾ it is immaterial to it whether it is payable to the father alone or to the father and mother. The

17. Galvin v. Brown, (Ind. App. 121 N. E. 447, 3 W. C. L. J. 445, 18 N. C. C. A. 225.

18. Kirkoff Bros. & McElwaine v. McCool, 64, Ind. App. —, 116 N. E. 439, 18 N. C. C. A. 228.

19. Stubbs v. Ind. Comm. et al., 289 Ill. 525, 124 N. E. 527, 5 W. C. L. J. 67; Unitah Power & Light Co. v. Indus. Comm., — Utah —, ('920), 189 Pac. 875, 6 W. C. L. J. 229.

20. Zubradt v. Shepard's Estate, 180 N. Y. App. Div. 20, 167 N. Y. Supp. 306, 18 N. C. C. A. 225.

21. Parker v. Ind. Ins. Dept., 102 Wash. 54, 172 Pac. 830, 18 N. C. C. A. 223, 2 W. C. L. J. 408.

amount is correct, * * * *, and it is unnecessary for us now to determine to whom it should be paid, as this appeal involves the amount only."[22]

Under the California Act the commission is given discretion in the apportionment of the death benefit.[23] "Certainly no court shall interfere with the determination of the commission in such a matter unless it is clearly made to appear that the conclusion is without substantial support in the record."[24]

It has been held in California that, "irregularities, or errors in mere matters of procedure, do not go to the jurisdiction of the commision to make awards, and are not grounds upon which the court may vacate an award."[25] But in a case where the commission found that an employee, who was killed while repairing an engine withdrawn from service for that purpose, was not engaged in interstate commerce, this was a conclusion of law presenting the question of jurisdiction of the commission and could be considered on certiorari to review it.[26]

Section 32 of the Oregon Act provides that, "such appeal shall have precedence over all other cases except criminal cases." But where it was sought to show that the court had not given a compensation case precedence the court said, "We cannot believe that the legislature intended that such appeals should be expedited to the extent of disarranging the orderly transaction of business in the circuit court; or that cases already set for trial, with witnesses under subpoena, should be displaced for that purpose."[27]

22. Scarpeletzos v. Connes & Rapits Corp., 224 N. Y. 606, 120 N. E. 876, 18 N. C. C. A. 226.

23. Sec. 19, Paragraphs D. and E., California Act.

24. Perry v. Ind. Acc. Comm., 176 Cal. 706, 169 Pac. 353, 1 W. C. L. J. 474, 18 N. C. C. A. 224; Popst v. Indus. A. C. Cal.,— Cal.—, 192 Pac. 296, 6 W. C. L. J 643.

25. Maryland Casualty Co. v. Ind. Acc. Comm., 178 Cal. 491, 173 Pac. 993, 2 W. C. L. J. 616, 18 N. C. C. A. 228.

26. Hines D. G. R. R. v. Indus. Acc. C. Cal., — Cal. —, 102 Pac. 859, 6 W. C. L. J. 628.

27. Miller v. State Ind. Acc. Comm., 84 Ore. 507, 165 Pac. 576, 18 N. C. C. A. 240.

The appellant in a Connecticut case made different claims as a ground for appeal from the decision of the superior court than he had made in appealing to the Superior court, and he said: "None of the claims of law made before the commissioner and comprising the grounds of the appeal from the commissioner are a part of the appeal from the judgment of the superior court to this court. The claims of law made before the commissioner and contained in the appeal from his decision are the only claims of law which can be heard in the superior court, and on the appeal from its decision to this court."[28] Where the superior court reserved certain questions of law for decision by the Supreme court of errors the court said, "the questions reserved are, and were intended to be, those contained in the reasons of appeal, None other could be considered by us upon a reservation of this character."[29]

A motion to vacate a judgment of the circuit court entered upon the arbitrator's award, is "addressed to the sound legal discretion of the court, and unless it appears that such discretion has been abused this court will not interfere upon appeal. Eggleston v. Royal Trust Co., 205 Ill. 170, 68 N. E. 709."[30]

Where an Industrial Commission in making an award in a lump sum to the widow of deceased, made the award under the name of Joseph, when deceased's name was James the court held that this was sufficient error to warrant correction.[31]

Upon appeal an award is presumed to have been regularly made and the commission need not recite the details of its procedure in arriving at an award.[32]

Although an original award of the commission is not subject to be set aside on appeal because not taken within the time

28. Carter v. Rowe, 92, Conn. 82, 101 Atl. 491, 18 N. C. C. A. 227.

29. Swanson v. Latham & Crane, 92 Conn. 87, 101 Atl. 492, 18 N. C. C. A. 227; Osterhout v. Latham & Crane, 92 Conn. 89, 101 Atl. 494, A. 1 W. C. L. J. 286.

30. Liberty Foundries Co. v. Ind. Comm., 289 Ill. 601, 124 N. E. 559, 5 W. C. L. J. 47.

31. Vassilakis v. Fairfax Hotel Co., Inc., 194 N. Y. Supp. 774, (1920), 7 W. C. L. J. 139.

32. Hackley-Phelps-Bonell Co. v. Indus. Comm., —Wis.—, (1920), 179 N. W. 590, 6 W. C. L. J. 724.

specified for appeals, it can be considered to determine whether the circumstances justify a modification of the award to meet changed conditions.[33]

An assignment that an award is contrary to law is sufficient to present the question of sufficiency of the evidence.[34]

"In an action under the (Kansas) Workmen's Compensation Act, the answer was a general denial. On the trial it was shown that no notice of the accident was given to the employer within 10 days as required by section 5916, Gen. Stat. 1915. No instructions were asked with respect to the question of notice, and, the record failing to disclose that the question was called to the attention of the trial court, it is too late to raise the question in the appellate court." [35]

The Industrial Accident Commission has jurisdiction to award compensation to employees only, therefore its finding that applicant was an employee is subject to review to determine whether the jurisdictional facts exist, especially so under Const. Art. 20, § 21, as amended in 1918, which makes all decisions of the Industrial Accident Commission of California, subject to review by the appellate courts.[37]

Constitutional questions must be raised in the trial court.[38]

Where the statute fails to define the meaning of the word "dependents" it is not error for the trial court to refuse to define it.[39]

In Pennsylvania on an appeal from a judgment wherein the award of the industrial commission is sustained the Supreme Court will examine the findings and reasons stated in the ad-

33. Bowne v. Stamford Rolling Mills Co.,—Conn.—, (1920), 111 Atl. 215, 6 W. C. L. J. 515.

34. Alexander Box Co. v. Cutshall, — Ind. App. —, (1920), 127 N. E. 286, 6 W. C. L. J. 155; Kramer v. Huntington Steel Foundry Co., — Ind. App. —, (1920), 127 N. E. 284, 6 W. C. L. J. 154.

35. Vassar v. Swift Co., — Kan. —, 189 Pac. 943, 6 W. C. L. J. 166; Voight v. Indus. Comm., — Ill. —, (1921), 130 N. E. 470.

37. Roberts v. Indus. Acc. Comm., — Cal. —, (1921), 197 Pac. 978.

38. Oden Coal Co. v. Indus. Comm., — Ill. —, (1921), 130 N. E. 704.

39. Southern Surety Co. v. Hibbs, — Tex. Civ. App. —, (1920), 221 S. W. 303, 6 W. C. L. J. 224.

judications of the referee and board as well as those on which the opinion of the court of common pleas is based.[40]

Appellant cannot complain of the method employed in computing the wages of the employee, where the award was less than it would be if the correct method had been employed.[41]

A simple assignment of error standing alone is insufficient for any purpose, as not pointing out wherein or of what the alleged error consists.[42]

It was held in a Colorado case that on error to the district court, which upon a writ of review to the Industrial Commission affirmed the commission's award of compensation, the Supreme Court cannot determine the question whether the commission had jurisdiction; claim being made that the parties were not within the compensation act, where no application was made to the commission as required by the statute for a review; the question was not before the Supreme Court for determination.[43]

On an informal and summary appeal from a decision of the Washington Industrial Commission, evidence that a particular disorder entitled the employee to a higher award is not objectionable merely on the theory that the fact is not alleged in the complaint on file. The statute expressly provides that "full opportunity to be heard shall be had before judgment is pronounced." It is doubtful whether any written pleadings are contemplated under the Washington Statute.[44]

On appeal from an award, the entire finding and the memorandum decisions are to be read together as a whole.[45]

40. Morris v. Yough Coal And Supply Co., — Pa. —, (1920), 109 Atl. 914, 6 W. C. L. J. 210.

41. Uintah Power & Light Co. v. Indus. Comm., — Utah —, (1920), 189 Pac. 875, 6 W. C. L. J. 229.

42. Day v. Sioux Falls Fruit Co., — S. Dak. —, (1920), 177 N. W. 816, 6 W. C. L. J. 216.

43. Midget Consol. Gold Mining Co. v. Indus. Comm., — Colo. —, (1920), 193 Pac. 493, 7 W. C. L. J. 26.

44. Maddox v. Indus. Ins. Comm., — Wash. —, (1920), 193 Pac. 231, 7 W. C. L. J. 163.

45. Saunders v. New England Collapsible Tube Co., — Conn. —, (1920), 110 Atl. 538, 6 W. C. L. J. 271.

An error in computation of an award made may be corrected and modified upon appeal without reversing the judgment.[46]

The appellant employer has no right to complain on appeal that the compensation was not computed in accordance with the statutory provisions, where the amount awarded was less than it would have been had the statutory provisions been strictly followed.[47]

Where the facts are undisputed, whether or not a policy of insurance has been cancelled, is reviewable as a question of law.[48]

It is discretionary with the trial court, after remand, whether it will grant a rehearing, in order that the defendants may have an opportunity to investigate further the question of dependency.[49]

Where an employee does not ask for the submission to the board, of his petitions for reopening of the case, and appears before the commissioner, he cannot, on appeal, complain of the determination of the case by the commissioner without referring it to the Board.[50]

Whether an employees disability is due to the injury or his unreasonable refusal to submit to an operation, is a question for the commission to decide, and unless it acted unreasonably or abused its discretion, the court cannot interfere with the finding.[51]

Where the motion for appeal was made in writing in accordance with the Louisana code practise (Art. 573), neither a certificate nor affidavit was necessary and neither party need furnish an appeal bond.[52]

In the absence of part of the evidence, a case cannot be reviewed on the merits, where the findings were not sufficiently specific to eliminate the necessity of including the evidence in the record.[53]

46. Chance v. Reliance Coal & Mining Co., — Kan. —, (1920), 193 Pac. 889, 7 W. C. L. J. 201.

47. Hartford Acc. & Indem. Co. v. Durham, — Tex. Civ. App. —, (1920), 222 S. W. 275, 6 W. C. L. J. 395.

48. Altinovitch's Case, — Mass. —, (1921), 129 N. E. 372; Kelley v. Delaware L. & W. R. Co., — Pa. —, 113 Atl. 419, (1921).

49. Venuto v. Carter Lake Club, —Neb.—, (1921), 181 N. W. 377.

50. Vodopich v. Trojan Mining Co., — S. D. —, (1921), 180 N. W. 965.

51. O. W. Rosenthal & Co. v. Indus. Comm., — Ill. —, (1920), 129 N. E. 176, 7 W. C. L. J. 286.

52. Graver v. Gillespie, —La.—, 86 So. 730, 7 W. C. L. J. 301.

53. Indianapolis Bleaching Co. v. Morgan, — Ind. App. —, (1921), 129 N. E. 644.

An agreement between the counsel that the only issue involved on appeal is the constitutionality of the statute will not preclude the court from determining any issue presented by the record.[54]

A transcript of the proceedings before the commissioner, furnished by the claimants, is no part of the record and will not be examined.[55] Papers unless made part of the record cannot be considered on appeal.[55]

A brief which is discourteous and in violation of professional ethics, will be stricken from the files.[56]

The Supreme Court, in a case appealed from the Workmen's Compensation Board after the passage of the act of June 26, 1919, (P. L. 642, Pa. St. 1920, § 21993), must consider whether there was any evidence to support the findings of the board and the court below and, if there was, whether the law has been properly applied thereto.[57]

Where it can be assumed that the trial court would have permitted an amendment of the complaint had it been requested, the appellate court will consider the case as though the complaint had been amended.[58]

§ 562 **Disposition of Appeal.**—Where an appellant has allowed the time for appeal to expire the commission's award is conclusive and no appeal will be permitted,[59] and if taken after the statutory period, will be dismissed.[60]

54. Blake v. Wilson, — Pa. —, (1920), 112 Atl. 126.

55. O'Boye v. Parker Young, — Vt. —, (1921), 112 Atl. 385.

56. Carroll v. Indus. Comm., — Colo. —, (1921), 195 Pac. 1097.

57. Stroh v. Eastern Penn. Rys. Co., — Pa. —, (1921), 113 Atl. 62.

58. Savich v. Hines, — Wis. —, (1921), 182 N. W. 924.

59. Bernstein v. Brotham, 275 Ill. 290, 114 N. E. 120, 14 N. C. C. A. 87; Neal v. Ind. Acc. Comm. of Cal., 171 Pac. 696, 18 N. C. C. A. 208, 1 W. C. L. J. 926; Enneberg v. State Ind. Acc. Comm., 88 Ore. 436, 171 Pac. 765, 18 N. C. C. A. 212, 1 W. C. L. J. 1144; Clemens v. Clemens & Grell, 180 N. Y. App. Div. 92, 167 N. Y. Supp. 519, 18 N. C. C. A. 213; Wise v. Borough of Cambridge Springs 262 Pa. 139, 104 Atl. 863, 18 N. C. C. A. 218.

60. Highfield v. Duffy, 64, Ind. App. —, 115 N. E. 347, 14 N. C. C. A. 90; C. & W. Kramer Co. v. Miller, 64, Ind. App. —, 115 N. E. 597, 14 N. C. C. 90; Humphreys v. Employers Liability Assur. Corp., 226 Mass. 143, 115 N. E. 253, 14 N. C. C. A. 90.

If the decision is favorable to the objector he cannot be heard to object. "As Hallerin claimed total disability and so testified, and the arbitrator found that he was not completely but only partially disabled and made an award accordingly, the error, if any, in the finding, would consist in allowing too little rather than too great an award on this question, as the only testimony in the record tends to show that he was totally disabled. Plaintiff in error cannot be heard to object because the finding against it was for too small an amount, Citing Becker v. People, 164 Ill. 267, 45 N. E. 500."[61]

"If the board had found total disability and made the award accordingly, such a finding and award would have been sustained by the record. * * * * Whatever error the board made, if any, was against the defendant in error and in favor of the plaintiff in error. Under such a showing, we would not be warranted in setting aside or reversing the judgment of the circuit court confirming the award, upon the familiar doctrine that plaintiff in error cannot take advantage of an error that is not prejudicial to it."[62]

In a Michigan case in which the Supreme court was evenly divided, it was held that the award should be affirmed.[63]

In Oregon it has been held that, since there is no statute that requires an appellant to bring up a transcript of the proceedings, a motion to dismiss on that ground must be overruled.[64]

And in a Connecticut case the court said: "The Superior court may by an order in the nature of a writ of certiorari require the whole or any part of the transcript of the evidence to be certified up and make it a part of the appeal record, whenever it appears necessary to do so in order to protect the substantial rights of parties not represented by counsel; but ordinarily no

61. Wells Bros. Co. v. Ind. Comm. of Ill., 285 Ill. 647, 121 N. E. 256, 3 W. C. L. J. 255, 18 N. C. C. A. 238.

62. Carson-Payson Co. v. Ind. Comm. et al., 285, Ill. 635, 121 N. E. 264, 18 N. C. C. A. 238, 3 W. C. L. J. 234.

63. Miller v. Acme White Lead & Color Works, 198 Mich. 637, 164 N. W. 432, 18 N. C. C. A. 237.

64. Enneberg v. State Ind. Acc. Comm., 88 Ore. 436, 167 Pac. 310, 18 N. C. C. A. 215.

part of the evidence before the commissioner should be certified to the superior court unless the reasons of appeal ask for correction or omission of some specific finding as to a subsidiary fact, or the addition of a material fact not found. The first and second reasons of appeal * * * * do not present any assignable reasons of appeal. They simply invite the superior court to ignore the commissioner's findings of subsidiary facts and to retry the ultimate issues of fact upon an independant examination of a transcript of the evidence before the commissioner. We have repeatedly held that this cannot be done. * * * 'The superior court cannot on appeal retry the facts.' Kennerson v. Thames Co., 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A 436. 'The trial court does not retry the facts. It decides the appeal upon the findings made by the commissioner, unless the appeal assigns as error the findings or omission to find any facts, and the court finds that facts have been found or omitted, which, if found in accordance with the evidence, would affect the result.' Citing Swanson v. Latham, 92 Conn. 87, 101 Atl. 492."[65]

In disposing of an appeal where the only point at issue was, whether or not the deceased was engaged in interstate commerce, the court held that the appellant was not prejudiced by the fact that the defendant assumed the burden of proof. The appellant had full opportunity to introduce testimony, and when the evidence introduced by the defendant proved the deceased was engaged in interstate commerce, the case could not be reversed because the defendant assumed the burden when the law placed it upon the plaintiff.[66]

Under section 3642 Nebraska Rev. St. 1913 (part 1, Employer's Liability Act), the court has power to reverse a judgment in a proper case if the evidence shows inadequacy in the amount of the verdict; or to reverse a judgment that from the evidence appears to be excessive, and grant a new trial, unless a remittitur be filed in such sum as to the court may seem just.[67]

65. Rainey v. Tunnel Coal Co., 93 Conn. 90, 105 Atl. 333, 3 W. C. L. J. 227, 18 N. C. C. A. 214.

66. Carberry v. D. L. & W. R. Co., 93 N. J. L. 414, 108 Atl. 364, 5 W. C. L. J. 419.

67. Brown v. York Water Co., — Neb. —, 177 N. W. 833, 6 W. C. L. J. 190.

Where there was evidence from which the jury might find that an accident aggravated a preexisting condition and they did so find, it was held that an inconsistency between the finding and an instruction, not complained of by either party, that plaintiff could not recover for such aggravation could be disregarded and the general findings and judgment upheld.[68]

Where all the evidence of the record shows and the findings state that an injury was to the left leg, the apparent clerical error in inserting the word "right" in the award will be corrected by substituting the word left, and the judgment affirmed, instead of remanding the cause for the correction of the error.[69]

Where it is determined on appeal that an award for double compensation is erroneous, in that the compensation should not have been doubled, and the record contains the requisite date for making the computations, the decree may be modified without reversing it and remanding to the commission.[70]

Where under the Washington Act a compensation claimant, who has appealed to the Superior Court, takes a voluntary nonsuit, on objection to the introduction of evidence under the complaint, the cause being dismissed without prejudice under the original notice of appeal, the dismissal, for want of a new appeal within the statutory 20 days, affirms the award appealed from.[71]

Where upon appeal, the record fails to show that the work in which plaintiff was engaged was under the direction, execution, or control of the lessor company the judgment must be held erroneous.[72]

68. Blackburn v. Coffeyville Vitrified Brick & Tile Co., — Kan. —, (1920), 193 Pac. 351, 7 W. C. L. J. 58.

69. Centralia Coal Co. v. Indus. Comm., — Ill. —, (1920), 128 N. E. 554, 7 W. C. L. J. 40.

70. Riley v. Standard Acc. Ins. Co., 227 Mass. 55, 116 N. E. 259, A 1 W. C. L. J. 858; Buhse v. Whitehead & Kales Iron Works, 194 Mich 413, 160 N. W. 557, A 1 W. C. L. J. 883; Bell's Case, — Mass. —, (1921), 130 N. E. 67.

71. Maddox v. Indus. Comm., — Wash. —, (1920), 193 Pac. 231, 7 W. C. L. J. 163.

72. Maughlelle v. J. H. Price & Sons, 99 Kan. 412, 161 Pac. 907, A 1 W. C. L. J. 632.

Where it appears upon review that the trial judge has failed to find that the death was due to an accident, the case should be returned for a new trial.[73]

Where the findings are not definite, the court on appeal cannot enter final judgment.[74]

After the court has sustained the appellant's objection to rulings of the chairman on a matter of law, it may proceed to determine the case upon the evidence found in the report.[75]

The fact that an employee was not notified before an order was entered terminating the payment of compensation, does not require the reversal of a subsequent order of the commission denying further compensation, where the employee took no action against the former order, but petitioned the commission for an award of additional compensation on which he was fully heard.[76]

An award for total disability will not be reversed because the Accident Board was mistaken as to the cause, if it was shown that the incapacity was due to injuries received upon the particular occasion in question, and upon appeal to the full board the compensation may be increased even though the appeal was prosecuted by the employer and not the claimant.[77]

"A judgment will not be reversed because of the trial having been begun in less than 10 days after the issues were made up, where it is clear that no actual prejudice resulted."[78]

"The question of dependency is one of fact to be determined from the evidence. Sections 38, W. C. A. (Acts 1919, p. 165). The board has not found specifically that the appellees are dependents. Instead of finding the ultimate fact of dependency, the board has

73. Dunnewald v. Henry Steers, 89 N. J. L. 601, 99 Atl. 345, B. 1 W. C. L. J. 1135.

74. Miller v. State Indus. Comm., 84 Ore. 507, 165 Pac. 576, B 1 W. C L. J. 1497.

75. Mac Donald v. Employer's Liability Assur., Corp., — Me. —, (1921), 112 Atl. 719.

76. Doscolos v. Indus. Comm., — Utah, —, (1921), 195 Pac. 638.

77. Margenovitch v. New Port Mining Co., — Mich. —, (1921), 181 N. W. 994.

78. Southern v. Western States Portland Cement Co., — Kan. —, (1921), 194 Pac. 637.

set out the evidential facts. However, the only legitimate inference to be drawn from the evidential facts is that the appellees are dependent. While it was the duty of the board to have found the ultimate fact specifically, yet, since the board has acted on that inference, and in view of the attitude of the parties with respect thereto, we will not return the case to the board and require it to make a specific finding on that point, but will treat the evidential facts as the equivalent of the ultimate fact.''[79]

§ 563. **Matters Waived.**—Constitutional questions may be waived by failure to appeal properly.[80] An award was granted and judgment rendered in Indiana. An action in debt was brought thereon in Illinois and affirmed in the appellate court. The cause was before the Supreme court on petition for certiorari and the court said, ''The Appellate Court, in passing on this question, rightly decided that under the statute and decisions of this state said appellate court was without jurisdiction to pass on a constitutional question. There can be no question that if litigants desire to question the constitutionality of an Illinois statute they waive such question by appeal to the Appellate Court instead of directly to the Supreme court of this state, and therefore, by like reasoning, the question of the constitutionality of the Indiana statute cannot now be raised in this court. * * * Appealing to the appellate court, and submitting the case for decision upon errors which that court might lawfully consider, is a waiver or abandonment of any assignment of error which that court could not pass upon and which can be reviewed only by this court on a direct appeal. Town of Scott v. Artman, 237 Ill. 394, 86 N. E. 595 and cases cited; Vermillion Drainage District v. Shockey, 238 Ill. 237, 87 N. E. 335; People v. Viskniskki, 255 Ill. 384, 99 N. E. 621.''[81]

79. Hoosier Veneer Co. v. Stewart, — Ind. App. —, (1920), 129 N. E. 246, 7 W. C. L. J. 289.

80. Armour & Co. v. Ind. Board of Ill., 275 Ill. 328, 114 N. E. 173, 14 N. C. C. A. 105.

81. Drtina v. Charles Tea Co., 281 Ill. 259, 118 N. E. 69, 18 N. C. C. A. 238.

A constitutional question cannot be considered by the supreme court unless it is shown by the records of the circuit court in the proceedings under the Compensation Act, that the question was there raised.[82]

Where the jury was uninstructed on a point which the defendant claimed was error, the court on appeal held that its claim was unavailing because the defendant should have asked instructions to cover the point.[83] However, where instructions were asked on a certain point, such point was not waived, and could be reviewed on appeal.[84]

The Industrial Commission permitted an application for compensation after the statutory period, upon the theory that the time was extended because of an agreement between the parties to pay compensation. In the petition for rehearing no objection was made. The court held that by the failure to object on rehearing the defendant had waived the right to do so later.[85]

In Indiana, the Board requires that if any special defense be relied upon by the defendant, such as wilful misconduct of employee, it must be pleaded by affirmative answer five days before hearing, and in a case in point the court said: "* * * The board was of the opinion that the question of willful misconduct was not in issue because it has not been pleaded as provided in said rule. In this the board was entirely right. The adoption of said rule was a reasonable and timely exercise of the authority conferred by the Legislature Section 55, W. C. A. It tends to facilitate the work of the board and to promote justice. Whatever the question of willful misconduct might have been worth, if pleaded, appellant has waived it by its failure to comply with said rule."[86]

82. Savoy Hotel Co. v. Ind. Board of Ill., 279 Ill. 329, 1 W. C. L. J. 320, 116 N. E. 712, 18 N. C. C. A. 239.

83. Gailey v. Peet Bros. Mfg. Co., 98 Kan. 53, 157 Pac. 431, 14 N. C. C. A. 105.

84. Williams v. Schaff, — Mo. —, (1920), 222 S. W. 412, 6 W. C. L. J. 346.

85. Northwestern Pac. R. Co. v. Ind. Acc. Comm. of Cal., 173 Cal. 123, 161 Pac. 123, 14 N. C. C. A. 99.

86. Northern Indiana Gas & Electric Co. v. Pietzvak, 64 Ind. App. —, 118 N. E. 132, 1 W. C. L. J. 590, 18 N. C. C. A. 239.

"The action or proceeding to review the finding or order of the commission must be timely commenced as indicated in section 87, and before the compensation has been paid to the employee; otherwise the right to question his right to compensation under the act must be deemed waived."[87]

The failure to object in the inferior tribunal will often preclude the right to object upon appeal, thus waiving an advantage by the failure to object at the proper time. Thus, in Illinois, the employer cannot, upon writ of error to the Supreme court, raise an objection or attack the basis of an award upon grounds not presented to the inferior court or commission.[88] As stated by the court, "So far as disclosed by the record, the question is raised in this court for the first time. The objection is one that might be waived and must be held to have been waived by not being specifically raised below, and it is too late to raise the objection now for the first time."[89]

The amount of the award cannot be raised and questioned on certiorari when not urged before the board on hearing.[90] In Illinois where it was urged that there was no evidence to support the amount of the award, the court said, "We do not think the plaintiff in error is in a position on this record, to raise this question. It is quite clear from the record that the question was not raised before the arbitrator or before the Industrial Commissioner, and therefore it cannot be raised for the first time before the circuit court or this court."[91] And again in Illinois, it was stipulated by the parties before the arbitrator that, "the only question in dispute was whether the accident arose out of and during the course of the

87. Indust. Comm. of Utah v. Evans, Dist. Judge, — Utah —, 174 Pac. 825, 18 N. C. C. A. 208, 2 W. C. L. J. 848.

88. American Milling Co. v. Ind. Board, 279 Ill. 560, 117 N. E. 147; Chicago Steel Foundry Co. v. Ind. Board, 286 Ill. 544, 122 N. E. 150, 3 W. C. L. J. 590; Meyer v. Ind. Comm., 286 Ill. 642, 122 N. E. 51, 3 W. C. L. J. 603.

89. Storrs v. Ind. Comm. et al., 285 Ill. 595, 121 N. E. 267, 3 W. C. L. J. 238, 18 N. C. C. A. 231; Carter v. Rowe, — Conn. —, 101 Atl. 491, A 1 W. C. L. J. 280.

90. Byle et al. v. Grand Rapids Blowpipe & Dust Arrester Co. et al., (Mich.), 175 N. W. 416, 5 W. C. L. J. 402.

91. Wells Bros. Co. v. Industrial Comm., 285 Ill. 647, 121 N. E. 256, 3 W. C. L. J. 255, 18 N. C. C. A. 230.

employment." Upon appeal it was contended by the plaintiff in error that the deceased was not engaged in an extra hazardous occupation. The court said: "The question now sought to be raised was not urged before the Industrial Board on review or before the circuit court. By entering into this agreement and not thereafter raising the question either before the arbitrator or the Industrial Board on review, the plaintiff in error waived the right to raise any question of jurisdiction."[92]

Objections may not be raised on appeal, where no objections were made in the inferior tribunal, to the right of the administrator to act in the proceedings,[93] to the date of the commencement of payments of the award,[94] or to evidence which the board had stated would not be admitted if objected to and no objection was made before the board.[95] In a Massachussetts case the insurer brought out for the first time on appeal that the injured was working for a partnership and the policy was in the name of only one of the partners. The court said that, "It would be manifestly unjust to permit the case to turn now upon a contention not raised at the trial and as to which evidence was not directed. Mallory's Case, 231 Mass. 225, 120 N. E. 591."[96] And in Indiana where the parties appeared before the board and "said cause was heard and determined without any suggestion or objection that no answer had been filed by appellant. Under such a state of facts the appellee would be in no position to take advantage of appellant's failure to answer even under the rules governing civil procedure. Train v. Gridley, 36 Ind. 241; Taylor v. Short, 40 Ind. 506; Stingley et al. v. Bank, 42 Ind. 580; Chambers et al. v. Butcher et al., 82 Ind. 508."[97] Nor

92. Chicago Packing Co. v. Ind. Board of Ill., 282 Ill. 497, 118 N. E. 727, 18 N. C. C. A. 231, 1 W. C. L. J. 749.

93. H. C. Goelitz Co. v. Ind. Bd. of Ill., 278 Ill. 164. 115 N. E. 855, 14 N. C. C. A. 98.

94. Fischer v. W. F. Priebe & Co., 178 Ia. 512, 160 N. W. 48, 14 N. C. C. A. 99.

95. H. C. Goelitz v. Ind. Bd. of Ill., 278 Ill. 164, 115 N. E. 855, 14 N. C. C. A. 98.

96. Goff's Case, (Mass.), 125 N. E. 145, 5 W. C. L. J. 252.

97. Zietlow v Smock, 64 Ind App. —, 117 N. E. 665, 1 W. C. L. J. 174, 18 N. C. C. A. 230.

when the counsel for the insurer stated before the board, "that he did not wish to raise any question as to the giving of notice of the injury," can the question be raised by the insurer, for the first time, before the supreme court on appeal.[98] And in an Illinois case the court held that the question of notice was waived where it was not raised until a motion for new trial was presented after the decision of the court.[99] But where it was shown that at the hearing before the commission, in response to a direct inquiry as to whether the defendant denied liability his attorney stated that liability was denied on the ground that "Appendicitis (from which the employee suffered) is not the result of an accident, and that we had no notice of claim for compensation or notice of injury as provided for by the compensation act." The court held that the defense of want of notice was raised.[1]

There may be questions of law presented by the record which were not before the arbitrators—for exmple, constitutional questions. With respect to these the Illinois court has said: "It is not necessary, in order to secure such determination in the circuit court that there be a positive record or recital that such questions were presented to the arbitrators of the Industrial Board for their determination. If the record itself presents any question of law, the parties are entitled to have it determined by the circuit court. Whether or not the Workmen's Compensation Act, or any section of the same which it is claimed brings the case within its terms, is constitutional, is a question of law presented by any record of the Industrial Board containing a decision awarding compensation. While this is wholly a statutory proceeding and is covered by the provisions of the act, the ordinary rules of practice and procedure will be followed upon a review of the

98. Mallory's Case, 231 Mass. 225, 120 N. E. 591, 3 W. C. L. J. 55, 18 N. C. C. A. 230.

99. American Milling Co. v. Ind. Bd. of Ill., 279 Ill. 560, 117 N. E. 147, 18 N. C. C. A. 230.

1. Armstrong v. Oakland Vinegar & Pickle Co., 197 Mich. 334, 163 N. W. 897, 18 N. C. C. A. 218.

judgment of the circuit court where they do not conflict with the express provisions of the act." [2]

In Illinois where any of the assigments of error are not argued in the briefs filed in the Supreme court they will be deemed waived.[3]

The insurer of the president of a company carried on negotiations for the adjustment of a claim made by dependents of a deceased employee of the company. It raised no question that it was not the insurer of the company. It filed the proper reports and made payments under compensation for about two years before raising the point. The court said, "We do not disagree with the conclusion and finding of the Industrial Accident Board that the Prudential Casualty Company could and did waive possible objection as to parties, and conceded plaintiff's claim that it was jointly liable with the construction company." [4]

In California the commission gave notice that an award would be amended unless good cause was shown to the contrary, and the insurance company objected solely upon the ground of the absence of the relation of master and servant. The court said that, "Its failure to make other objection or to offer any other proof concerning the disability stated in the physician's certificate, was a waiver of any objection to the proceeding." [5]

Under the Nebraska Act, which provides for the filing or a notice of intention to appeal with the commissioner within Seven days after an award has been rendered, the defense may waive their rights, since the filing of such notice is intended only for the benefit of the defense.[6]

2. Savoy Hotel Co. v. Ind. Bd. of Ill., 279 Ill. 329, 116 N. E. 712, 18 N. C. C. A. 230.

3. International Harvester Co. v. Ind. Board, 282 Ill. 489, 118 N. E. 711, 1 W. C. L. J. 762.

4. Diebel v. Spitzley & Widenman Const. Co., (Mich.), 175 N. W. 126, 5 W. C. L. J. 280.

5. Massachusetts Bonding & Ins. Co. v. Ind. Acc. Comm., 168 Cal. 488, 168 Pac. 1050, 1 W. C. L. J. 484.

6. Mucha v. Morris & Co., — Neb. —, (1920), 179 N. W. 500, 6 W. C. L. J. 703.

An employer does not waive his right to plead the statute of limitations, regarding the time of making a claim, by offering to settle or by caring for medical bills.[7]

"In an action under the Kansas Workmen's Compensation Act, the answer was a general denial. On the trial it was shown that no notice of the accident was given to the employer within ten days as required by section 5916. Gen. Stat. 1915. No instructions were asked with respect to the question of notice, and, the record failing to disclose that the question was called to the attention of the trial court, it is too late to raise the question in the Appellate Court."[8]

A writ of certiorari must issue in Illinois within 20 days after notice of the Board's decision, and an objection that it was not sued out in time must be raised in the circuit court.[9]

Where testimony of the injured employee as to the percentage of his loss was objected to before the arbitrator, the objection was not waived by allowing him to testify before the commission that he had so testified before the arbitrator.[10]

An objection to the time of an award is waived where counsel did not object to the date of the award but stated that compensation might be awarded in a lump sum.[11]

§ 564. **Remand.**—The appellate court may at its discretion remand a case to the commission or to the court of original juris-

7. Petraska v. National Acme Co., — Vt. —, (1921), 113 Atl. 536.

8. Vassar v. Swift Co., — Kan. —, 189 Pac. 943, 6 W. C. L. J. 166.

9. Decatur Const. Co. v. Indus. Comm., — Ill. —, (1921), 129 N. E. 738.

10. Old Ben Coal Corp. v. Indus. Comm., — Ill. —, (1921), 129 N. E. 773.

11. McDonald v. Indus. Comm., 165 Wis. 372, 162 N. W. 345, B 1 W. C. L. J. 1694.

12. Dunnewald v. Henry Steers Inc., 89 N. J. L. 601, 99 Atl. 345, 14 N. C. C. A. 103; Karges v. Indus. Comm., — Wis. —, 162 N. W. 482, B 1 W. C. L. J. 1679; Wm. Rahr & Sons v. Indus. Comm., — Wis. —, 163 N. W. 169, B 1 W. C. L. J. 1705.

13. Thompson v. Twiss, 90 Conn. 444, 97 Atl. 328, 14 N. C. C. A. 104; Gauthier v. Penobscot Chemical Fiber Co., — Me. —, (1921), 113 Atl. 28.

diction, where there is an absence of findings,[12] or for the purpose of correcting findings.[13] In Connecticut a motion that the case be recommitted must be in writing.[14]

The recommission of the case rests in the discretion of the court. In Massachusetts the court refused to recommit the case to the board, and the Supreme court upon appeal held such recommission was within the discretion of the court below.[15] A Kansas case on appeal had been reversed on the ground that a release executed by the plaintiff barred further recovery. A motion was filed that the reversal be modified to direct a new trial. In refusing to remand for new trial the court said that, "In as much as the plaintiff had full opportunity at the trial of the case to show any reason why that action should be taken, and failed to do so, we do not think the ends of justice require that he should now be given a second hearing, on the chance that he might be able to better his showing."[16] Nor will a case be remanded for the board to reconsider facts which it had considered on the original hearing,[17] nor where an error in computation of the verdict can be corrected from the findings.[18]

When the evidence fails to support an award the court may reverse and remand a cause to enter judgment in accordance with the evidence.[19] Or, as said by the court in Indiana, "Our conclusion necessitates a reversal. * * * Our Workmen's Compensation Act does not specifically direct what shall be the mandate of this court in case of reversal. It is our judgment, however, that the mandate should be regulated by the facts of the particular case. In the case at bar it appears to us that the ends

14. Blanton v. Wheeler & Howes Co., 91 Conn. 226, 99 Atl. 494, 14 N. C. C. A. 103.

15. Bean's case, 227 Mass. 558, 116 N. E. 826, 18 N. C. C. A. 235; Recommitted, Chisholm's case, — Mass. —, (1921), 131 N. E. 161.

16. Odrowski v. Swift & Co., 99 Kan. 163, 162 Pac. 268, 14 N. C. C. A. 102.

17. Sciola's case, — Mass. —, 128 N. E. 366, 7 W. C. L. J. 72.

18. Roll v. Monarch Cement Co., — Kan. —, 164 Pac. 1078 A 1 W. C. L. J. 649.

19. McPhee & McGinnity Co. v. Ind. Comm. of Col., 185 Pac. 268, 5 W. C. L. J. 160.

of justice will more nearly be met by directing a rehearing before the board, if appellee desires such rehearing."[20]

But in Pennsylvania the court hearing an appeal from the decision of the board should enter a final judgment, and where the court remanded the case to the board for adjustment in accordance with the terms fixed by the court, the Superior court on appeal said, "It is apparent that the order or judgment entered by the court is not final, from which only an appeal will lie to this court. Instead of remanding the case to the board for further and final action, which it had already taken, the court should have entered a final judgment. * * * There was no occasion for any further adjustment by the board; it had taken final action, and the appeal which the learned court had before it was from such action. The appeal which we are authorized to hear and determine is not from the award of the board but from the judgment of the court. The record is remanded that the court below may enter a final judgment on the appeal pending before it from the award of the Workmen's Compensation Board."[21]

Section 19, paragraph (f) of the Illinois Act, provides that the court "may remand the cause to the Industrial Commission for further proceedings * * *." But under this provision causes will not be remanded for the correction of clerical error.[22] There is no such provision in the Pennsylvania Act under which the above decision was rendered. In many states the court may recommit the case to the commission for further proceedings.[23] The court in Wisconsin, in upholding the right of the lower court to remand the case, said: "The commission having failed to find

20. Inland Steel Co. v. Lamber, 64 Ind. App. —, 118 N. E. 162, 1 W. C. L. J. 347, 18 N. C. C. A. 235.

21. Rakie v. Jefferson & Clearfield Coal & Iron Co., 259 Pa. 534, 103 Atl. 302, 1 W. C. L. J. 1147, 18 N. C. C. A. 229.

22. Centralia Coal Co. v. Indus. Comm., — Ill. —, 128 N. E. 554, 7 W. C. L. J. 40.

23. Laskowski v. Jessup & Moore Paper Co., (Del.), 108 Atl. 281, 5 W. C. L. J. 167; Doherty's Case, 222 Mass. 98, 109 N. E. 887, 14 N. C. C. A. 102; Peabody Coal Co. v. Ind. Comm. et al., 289 Ill. 330, 124 N. E. 603, 5 W. C. L. J. 57; Karges v. Ind. Comm. of Wis., 166 Wis. 69, 162 N. W. 482, 14 N. C. C. A. 102.

the fact as to whether or not plaintiff was misled by the failure to serve the notice within the 30 days as required by law, or as to whether or not there was an intention to mislead the plaintiff, the circuit court was clearly right in holding that the award could not stand and very properly directed that the record be remanded to the Industrial Commission for further proceedings. Therefore that part of the order appealed from must be affirmed."[24]

Where the award granted by the commission was challenged by the employer on the ground that the employment was not "Milling" and hazardous, nor that of "operating a vehicle" and hence did not come within the New York Act, the court said, "There is nothing whatever in the evidence indicating that the employers were in fact millers. * * * If such were the conceded fact, the award should be reversed, and the claim dismissed. * * * In view of the uncertainty as to the record containing all the evidence upon which the commission acted, which in our view of the case might be material, and owing to the lack of evidence as to the claimant being engaged in a business incidental to or connected with milling, * * * we think the award should be reversed, and the claim sent back to the commission for further hearing and finding."[25]

The court in Massachusetts, on appeal from an award for the death of an employee, due to a fall, said: "The expert testimony that the deceased did not die from any internal cause, does not show that her injury resulted from her employment. It does not appear that the board passed on the question of the cause of her injury, * * * nor is it stated that the cause is unknown. The report does not show, * * * the length of time she was away from the employment, or what she did in the interim. Findings on these questions may have some bearing on the issue to be decided. It follows that the case must be recommitted to the Industrial Accident Board to find the cause of Mrs. Hallet's fall, if the cause is found to be unknown, so state; and if the cause is known, to find

24. Rahr Sons Co. v. Ind. Comm. of Wis., 166 Wis. 28, 163 N. W. 169, 18 N. C. C. A. 234.

25. Vincent v. Taylor Bros., 180 N. Y. App. Div. 818, 168 N. Y. Supp. 287, 18 N. C. C. A. 234, 1 W. C. L. J. 692.

what that cause was. At such hearing further evidence may be introducted by both parties.''[26]

Under the 1919 Amendment to the Pennsylvania Act (P. L. 665) Art. 4, Section 427, when the common pleas sustains an exception to an award of the board and reverses its action, it must remit the record for further hearing, when, if the further evidence produced is merely cumulative, it is the duty of the board to disallow the claim.[27]

Where a claim for compensation was not made within the time limited by the Workmen's Compensation Act and no allegation of incapacity by way of excuse was made, yet where there was evidence of incapacity, the case should be remanded for further proceedings, and not reversed and the cause dismissed.[28]

Where an arbitration committee makes a so-called report to the industrial board that it could not agree, the industrial board should refer the matter back and require a final report from the committee.[29]

''Upon the decision being made by the court the administrator moved to amend the proceedings by substituting Staponas Gricis and Agota Gricis as applicants for compensation, and to remand the cause to the Industrial Commission for a further hearing. The court denied the motion on the ground that Staponas Gricis and Agota Gricis were not present in court in person or by authorized attorney or within the jurisdiction of the court, and that there was no evidence that they were still living. The petition for the adjustment of the claim was filed after the amendment of 1917 (Laws 1917, p. 490), and the procedure was therefore governed by that act. Suburban Ice Co. v. Industrial Board, 274, Ill. 630, 113 N. E. 979. Section 19f (Hurd's Rev. St. 1917, c. 48, Par. 144) provided that the court might remand the cause to the

26. Hallet's Case, 230 Mass. 326, 119 N. E. 673, 18 N. C. C. A. 234, 2 W. C. L. J. 281.

27. Kuca v. Lehigh Valley Coal Co., — Pa. —, (1920), 110 Atl. 731, 6 W. C. L. J. 499.

28. Georgia Casualty Co. v. Ward, — Tex. Civ. App. —, (1920), 221 S. W. 298, 6 W. C. L. J. 228.

29. Kerens-Donnewald Coal Co. v. Indus. Bd., 277 Ill. 35, 115 N. E. 225, A 1 W. C. L. J. 417.

Industrial Board for further proceedings, and might state the questions requiring further hearing. There being merely an insufficiency of proof as to the existence of the alleged beneficiaries, the application should have been remanded to the Industrial Commission for the purpose of permitting further proof as to that fact."[30]

Where a cause merits reversal because the commission's finding was based upon conjecture, the court will remand the case for further proceedings upon the commission's statement that new evidence has been obtained, without their supporting affidavits, where the claimant was too poor to engage counsel.[31]

§ 565. **Presumptions.**—On questions of fact there is a presumption in favor of the board's action. In Michigan where the appellant sought to show that subsequent injury caused the condition of the claimant the court said, "Just to what extent plaintiff's present condition is due to the original injury is somewhat difficult to determine. It may be inferred from Dr. O'Donnell's testimony that the effect of the injuries of March 7th would have disappeared had it not been for the injury of April 23d. This, however, was a question of fact, and we must assume that due consideration was given to it by the board."[32]

In Illinois presumptions are in favor of the circuit court's judgment. As stated by the court, "In this case the circuit court reversed the decision and award of the Industrial Board, and plaintiff in error has brought the record here to secure a reversal of the judgment of the circuit court. In order to justify that result, it must be made to appear that the decision of the Industrial Board was justified by the evidence heard by it, and that the judgment of the circuit court was wrong. This being a proceeding at law, it was not incumbent on the defendant in

30. City of Chicago v. Indus. Comm., — Ill. —, (1920), 127 N. E. 46, 6 W. C. L. J. 19.

31. Clapp's Parking Station v. Indus. A. C., — Cal. —, (1921), 197 Pac. 369.

32. Adams v. W. E. Wood Co., 203 Mich. 673, 169 N. W. 845, 3 W. C. L. J. 311, 18 N. C. C. A. 236.

error to bring up the evidence to support the judgment. The presumptions are in favor of the judgment of the circuit court, and plaintiff in error must overcome those presumptions. That is the doctrine of the Smith-Lohr Coal Mining Co. case." [33]

And in Washington, where the case came up to the Supreme court on the findings of the trial court alone, the court said: "All intendments and inferences are to be taken in favor of the court. We must presume that there was evidence to sustain the findings." [34]

In Indiana it was sought by the insurance carrier to set aside a compensation agreement on the ground of fraud. On an appeal from the order of the board denying the Insurance Company's motion the court held that, there being no finding on the issue of fraud, it was required to assume the absence of fraud as there were no facts forcing an inference of fraud.[35]

In a New York case, the point was raised on appeal that no written notice of the injury was given by the claimant within the statutory period. The court said, "The point was not raised before the commission. It is therefore presumed to have been given, Section 21." [36]

In Illinois it was held by the court on appeal that, in the absence of any stenographic report or statement of facts being filed, it must be presumed that the additional evidence heard by the board was sufficient to sustain the board's findings.[37]

Where an appeal was taken on the ground that the act was unconstitutional, the Supreme Court of Illinois said: "We have repeatedly held that where the contitutionality of a law is involved every presumption must be indulged and every reasonable

33. David Bradley Mfg. Co. v. Ind. Board of Ill., 283 Ill. 468, 119 N. E. 615, 18 N. C. C. A. 237, 2 W. C. L. J. 226.

34. O'Brien v. Ind. Ins. Dept., 100 Wash. 604, 171 Pac. 1018, 16 N. C. C. A. 663, 2 W. C. L. J. 171.

35. Aetna Life Ins. Co. v. Shiveley et al., (Ind. App.), 121 N. E. 50, 3 W. C. L. J. 261, 18 N. C. C. A. 236.

36. Cimmino v. John T. Clark & Son et al., (N. Y.), 184 N. Y. App. Div. 745, 172 N. Y. Supp. 478, 3 W. C. L. J. 178.

37. Smith-Lohr Coal Co. v. Indus. Board, 279 Ill. 88, 116 N. E. 656.

doubt resolved in favor of its validity."[38] And again in construing the act the court said that, "The courts are bound to presume that absurd, consequences leading to great injustice were not contemplated by the legislature and a construction should be adopted that it may be reasonable to presume was contemplated."[39]

On an appeal from an award, the question whether the death was suicidal or accidental was presented, and the court said: "There are legal presumptions which may be properly considered. 'In human experience it is the common desire and effort to preserve life rather than destroy it and hence the law, where a person is found dead, imputes to the circumstances the prima facie significance that death was caused by accident rather than suicide, and that presumption persists in its legal force to negative the fact of suicide until overcome by evidence.' Milwaukee Western Fuel Co. v. Industrial Commission of Wisconsin, 159 Wis. 635, 150 N. W. 998. Under this rule of presumption it was held in Steers v. Dunnewald, 85 N. J. Law, 449, 89 Atl. 1007, that the death under consideration must have arisen from either accident, suicide, or murder, and added, 'Suicide and murder involve criminal acts, and crime is not to be presumed. The only other alternative is accident.' In short, the amount of evidence, circumstantial as well as direct evidence, together with proper legal presumptions, are all to be taken into consideration when investigating the question whether any evidence was before the commissioner upon which he might properly find a verdict."[40]

§ 566. **Parties.**—Unless the provisions of the act expressly state that the commission shall be a party in interest, it shall not be so considered. As stated by the court in Utah: "We must further assume that referring to parties the Legislature intended

38. Dragovich v. The Iroquois Iron Co., 239 Ill. 478, 109 N. E. 999, 19 N. C. C. A. 475.

39. Louisville & N. R. Co. v. Ind. Board of Ill. et al., 282 Ill. 136, 118 N. E. 483, 1 W. C. L. J. 542.

40. Westman's Case, 183 Maine 133, 106 Atl. 532, 4 W. C. L. J. 213.

parties in interest and not the tribunal who is called on to decide."[41]

Section 2349—19 of the Wisconsin Act provides that, "Within twenty days from the date of the order or award any party aggrieved may commence * * * * action against the commission for the review of such order or award, in which action the adverse party shall also be made defendant." Service of summons of complaint must be had upon the commission and adverse party. The court will dismiss for lack of jurisdiction if service is had alone upon the commission.[42]

In California the individual members of the commission are not proper parties to be joined in a proceeding for review, though the commission itself may be a defendant, but the parties interested in maintaining the award must also be joined.[43]

While in Illinois the commission may be a party to the proceedings, it is not a party in interest, nor are the individual members parties in interest so as to permit the proceedings on certiorari to be brought in any county where the members of the board may be found. The only parties in interest within the meaning of the act are the claimant and the employer.[44] This means that an administrator, a beneficiary or an employer, may file a petition for adjustment of a claim for compensation.[45]

Where the state is a party it has been held in Oregon that no bond is required.[46] The court has said that, "The state of Oregon is interested in the orders made by its commissions and for that

41. Ind. Comm. of Utah v. Evans, — Utah —, 174 Pac. 825, 18 N. C. C. A. 207, 2 W. C. L. J. 848. But see North Beck Mining Co., v. Indus. Comm. —Utah — 200 Pac. 111.

42. New Dells Lumber Co. v. Ind. Comm. of Wis., 166 Wis. 207, 164 N. W. 824, 18 N. C. C. A. 210; Frontier Mining Co. v. Ind. Comm. of Wis., 168 Wis. 157, 169 N. W. 312, 18 N. C. C. A. 211.

43. Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218, 14 N. C. C. A. 89.

44. Arcade Mfg. Co. v. Ind. Board of Ill. et al., 282 Ill. 27, 113 N. E. 486, 18 N. C. C. A. 209, 1 W. C. L. J. 547; Louisville & N. R. Co. v. Ind. Board, 282 Ill. 136, 118 N.E.483, 1 W. C. L. J. 542.

45. National Zinc Co. v. Indus. Comm., — Ill. —, 127 N. E. 135, 6 W. C. L. J. 21.

reason no undertaking on appeal was necessary in this cause."[47]

An assignment of errors is joint and hence not available where not good as to all the parties joined. Where, on appeal, the co-appellant of the one against whom the award was made had not theretofore appeared in the case and the record was silent as to his interest in the case, the appeal was dismissed.[48]

If the claim is within the jurisdiction of the commission the insurance carrier need not be a party to the agreement for compensation, under section 20 of the New York Act,[49] but is a proper party and upon request should be made a party and is then entitled to apply under section 58 of the Indiana Act, to vacate an order approving an agreement.[50]

In construing the Nebraska act the court held the proper party plaintiff in an action to recover compensation for death might be the dependent, the legal guardian trustee of a minor dependent, the executor or administrator of the deceased.[51]

And in Kansas the administrator of the deceased employee was held to be the proper party to sue for compensation, the Kansas act not in terms preferring dependents.[52]

Under the "Federal Trading with the Enemy Act," where the award in favor of a nonresident infant dependent of deceased, was made payable to the Alien Property Custodian the dependent infant, though a proper party, was not the adverse party to the em-

46. Enneberg v. State Ind. Acc. Comm., 88 Ore. 436, 167 Pac. 310, 18 N. C. C. A. 218.

47. Miller v. State Ind. Acc. Comm., 84 Ore. 507, 159 Pac. 1150, 18 N. C. C. A. 218.

48. Campbell-Smith-Ritchie Co. v. Souders, 64 Ind. App. , 115 N. E. 354, 14 N. C. C. A. 90.

49. Hassen v. Elm Coal Co. 184 App. Div. 750, 172 N. Y. Supp. 430, 3 W. C. L. 181.

50. Frankfort General Ins. Co. v. Conduitt, — Ind. App. —, (1920), 127 N. E. 212, 6 W. C. L. J. 25.

51. Coster v. Thompson Hotel Co., (Neb.), 168 N. W. 191, 2 W. C. L. J. 526.

52. Smith v. Kaw Boiler Works Co., (Kan.), 180 Pac. 259, 4 W. C. L. J. 87.

ployer's action to review the award. The custodian is the adverse party.[53]

Where an administrator brings a claim under the New Jersey Act, in the courts of the state of New York, he must show that he was a person entitled to administration in New Jersey.[54]

The court's findings upon review is binding on all parties to the review although improperly made parties to the proceedings.[55]

Under the Pennsylvania Act, 1915 (P. S. 754) section 425 giving an implied right to appeal to any party interested under the act, where the insurer filed an answer for the employer but did not intervene on its own behalf, it cannot appeal for the employer and such appeal will be quashed.[56]

Where the mother of deceased is recipient under the award she is a necessary party to a proceeding on appeal and when not summoned the court has no jurisdiction.[57]

§ 567. **Jury.**—Where the act provides that on appeal questions of fact may be submitted to a jury, the court has no power to interfere with the jury. "As the case was tried by a jury, with the burden on the appellant to show that the decision of the commission was incorrect, it was for the jury to determine the questions of fact presented by the appeal, * * * and the court was not authorized to say that the appellant had met the burden imposed on it, or to assume a fact to be found by the jury."[58]

53. Milwaukee Western Fuel Co. v. Indus. Comm., — Wis. —, (1920), 179 N. W. 763, 7 W. C. L. J. 176.

54. Verdicchio v. McNab & Harlin Mfg. Co., — N. Y. App. Div. —, 164 Supp. 290, B. 1 W. C. L. J. 1240.

55. Komula v. Gen. Acc. Ins. Co., 165 Wis. 520, 162 N. W. 919, B. 1 W. C. L. J. 1687.

56. Bolden v. Greer, — Pa. —, 101 Atl. 816, B 1 W. C. L. J. 1508.

57. Gough v. Indus. Comm., 165 Wis. 632, 162 N. W. 434, B 1 W. C. L. J. 1670.

58. Jewel Tea Co. v. Weber, 132 Md. 178, 103 Atl. 476, 2 W. C. L. J. 87, 18 N. C. C. A. 227.

In an Iowa case in which the employer had rejected the act it was held that, on issue being joined by the pleadings, "A jury trial must be had, unless trial by jury is waived."[59]

In Ohio the court said, "The primary duty of the jury under the statute is to determine, first, the right of the claimant to recover; and, if it found that such claimant is entitled to participate in the fund, it then becomes its duty to make an award, not in any lump or gross sum, but just as the board of awards would have done had such board found in favor of the claimant. The jury has the same discretion as to duration of time the award shall run as the board of awards possesses, but it cannot make allowance of any sum in excess of the statutory limitations. * * * The jury in appeal cases of this character sits as an appellate board of awards. When it has rendered its finding, if approved by the trial judge and error be not prosecuted, it is the duty of the court to certify the finding and award to the Industrial Commission, and thereafter such proceedings should be had as if the commission itself had made the award."[60]

Where the plaintiff had failed to establish a cause of action the jury were instructed to find for the defendant, and it was held on appeal that the proof was insufficient to carry the case to the jury on the theory of the defendants negligence.[61]

An instruction, that the jury might consider all of the evidence of both the claimant and defendant, in an action for damages against a non-assenting employer to determine whether or not the defendant had overcome the presumption of negligence created against him by statute was not error.[62]

When an insurance company, which became subrogated to the rights of a widow and heirs to recover against a stranger for the death of an employee by paying compensation to her, brought ac-

59. Hunter v. Colfax Consol. Coal Co., 175 Ia. 245, 157 N. W. 145, 11 N. C. C. A. 952.

60. Roma v. Ind. Comm. of Ohio, 97 Ohio 247, 119 N. E. 461, 2 W. C. L. J. 122.

61. Zurich General Accident & Liability Ins. Co. v. Bowers, 171, Wis. 176 N. W. 772, 5 W. C. L. J. 758.

62. Obrien v. Las Vegas & T. R. Co., 242 Fed. 850, A 1 W. C. L. J. 72. C. L. J. 72.

tion to recover, it was error to charge the jury that the insurer was entitled to recover damages to the sons, when there was no damage to the sons, pleaded, or proved.[63]

The question of declarant's fear of impending death and the question of the credibility of the declarations, is for the jury to decide, when a dispute arises over the admissibility of dying declarations.[64]

"Under the Workmen's Compensation Act (Kan. Ben. St. 1915. Par. 5930, a jury trial is waived unless demanded, and where it is not demanded, a court may call a jury to find the facts, and may render judgment on the findings of the jury,"[65] and where a trial by jury is demanded and special questions are answered but no general verdict is returned, a judgment compelled by the answers to the questions will not be reversed.[66]

The jury is not authorized to make any finding other than the special issues submitted as to the ultimate facts contained therein, so that the court may determine upon the proper disposition of the case. The return of a general verdict is sufficient where a finding for either party would be equivalent to a finding of the only fact in controversy, and the verdict need not be in the form of an issue upon the single fact controverted.[67]

Where the evidence is clear and decisive that the injury did not result from an accident arising out of the employment, the defendant is entitled to a directed verdict.[68]

The question of whether the employer had rejected the Indiana act was, under proper instructions, a question for the jury, where

63. Massachusetts Bonding & Insurance Co. v. Los Angeles R. Corp., — Cal. —, (1920), 190 Pac. 161, 6 W. C. L. J. 253.

64. Vassar v. Swift & Co., — Kan. —, (1920), 189 Pac. 943, 6 W. C. L. J. 167.

65. Ruth v. Witherspoon-Englar Co., — Kan. —, 164 Pac. 1064, A 1 W. C. L. J. 652.

66. Ruth v. Witherspoon-Englar Co., — Kan. —, 166 Pac. 481, A 1 W. C. L. J. 655.

67. Schiller v. Baltimore & Ohio R Co., — Md. App. —, (1920), 112 Atl. 272.

68. New Cornelia Copper Co. v. Espinoza, (Ariz.), (U. S. C. C. of App.), (1920), 268 Fed. 742.

the employee had sued the employer for damages, at common law, on the theory that the latter had, by default, rejected the Act.[69]

Unless parties to a compensation case, under the Kansas act, demand a jury within ten days after issues are joined, they waive their right in this regard, but the court may then call a jury to make special findings of fact, and it is not error for the court to refuse to instruct the jury, nor to require it to return a general verdict.[70]

69. Talge Mahogany Co. v. Burrows, — Ind. —, (1921), 130 N. E. 865.
70. Zwaduk v. Morris & Co., — Kan. —, (1921), 197 Pac. 868.

CHAPTER XVIII.

MISCELLANEOUS MATTERS.

§
568. Substituted Plans or Schemes.
569. Assignment and Exemption of Compensation.
570. Preference of Compensation Claims.
571. Double Compensation.
572. Penalties.
573. Attorneys.
574. Costs.
575. Interest.
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577. Retroactive Operation of Statutes.
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579. Rights Under Federal Compensation Act and Federal Employers' Liability Act.

§ 568. **Substitute Plan or Schemes.**—The acts of several states in substance provide that a substitute plan or system of compensation may be used in place of that provided in the act. This was no doubt intended, to benefit those who are members of mutual aid or benefit organizations supported in whole or in part by large employers, as well as for firemen's and police relief associations maintained by many of the larger cities. It appears, however, upon investigation, that these substitute plans are little used, and the question of the jurisdiction of compensation boards or commissions over such plans or systems and claims thereunder has never been questioned in any American court. The informal opinions of the commissioners with whom the author has corresponded with reference thereto have differed widely.

The Washington Workmen's Compensation Act provides that municipal corporations are allowed to substitute their schemes of compensation for that provided by the act, and this provision has been held to be constitutional as it does not deprive citizens of equal privileges and equal protection of the

laws, even though the rates of compensation fixed by the various municipalities for the same injuries may differ, since in the absence of restrictions contained in the state constitution, the legislature may determine whether particular provisions shall extend to the whole state or be limited in their operations to particular portions of the state. All that the Federal Constitution requires is that they shall be general in their application within the territory in which they operate.[71]

§ 569. **Assignment and Exemption of Compensation Claims.**—The acts of all the states, except two, provide that compensation awards or claims for compensation, are non-assignable. . Washington makes awards or claims for compensation non-assignable prior to the issuance or delivery of a warrant or voucher. Iowa makes no provision concerning assignments. Likewise the majority of the states exempt compensation benefits from all claims of creditors. California allows a lien upon the award for attorney's fees, medical and burial expenses and advancements for living expense. Louisiana makes a judgment for alimony a lien upon compensation payments. Nebraska, Michigan and Pennsylvania allow a lien for attorneys' fees when approved by the court. Maryland and Wyoming exempt claims from creditors' liens prior to the issuance or delivery of a warrant or voucher. Ohio provides that payments, until made to the employee, are exempt from claims of creditors. Oregon and Washington provide that payments, before received by the employee are not subject to assignment and do not pass to any other person by operation of law.

The Federal act also provides that assignments of a claim for compensation under the act shall be void, and all compensation and claims therefor shall be exempt from all claims of creditors.

In Michigan it has been held that the provision in the act against assignment and providing further that payments under

71. State ex rel. Fletcher v. Carroll, City Comptroller, — Wash. —, 162, Pac. 593, 14 N. C. C. A. 932.

the act are not subject to attachment or garnishment, is constitutional and does not limit the right to contract.[72]

Under the New York act, claims against the insurer cannot be assigned.[73] Nor can an employee, who is entitled to compensation from the Ohio state fund, assign his right.[74]

An assignment of a claim to an insurance carrier, which by subrogation becomes the property of the employer when the negligence of a third person has been the cause of the injury, will be upheld.[75]

A provision validating an assignment of the workmen's cause of action to the insurer must be limited to its special purpose, and construed as repealing the existing law relating to the assignment of personal injury claims only to the extent that is necessary to effectuate the purpose of the statute.[76]

The assignment by the injured employee to his employer of so much of his claim against the third party as will indemnify the employer for compensation paid, does not bar the employee's right of action against the third party.[77]

The claim of the employee against a negligent third party on account of personal injuries has been held to be assignable to one who is a stranger to the entire matter.[78]

"If the beneficiary shall refuse to make such assignment of his claim against a third party or to prosecute said action in his own name when required by the commission, he shall not be entitled to compensation under the act."[79]

72. Mackin v. Detroit-Timkin Axle Co., — Mich. —, 153 N. W. 49.

73. Matter of Woodward v. E. W. Conklin & Son Inc., 171 App. Div. 736, 157 N. Y. S. 948.

74. In re Berg, 1 Bull. Ohio Ind. Comm. 102.

75. Frankfort Gen. Ins. Co. v. City of Milwaukee, —Wis.—, 159 N. W. 581.

76. United States F. & G. Co. v. N. Y. Regs. Co., 93 Misc. Rep. 118, 156 N. Y. S. 615.

77. Lancaster v. Hunter, — Tex. Civ. App. —, 217 S. W. 765.

78. Shreveport v. S. W. Gas & Elec. Co., 140 La. —, 74 So. 559; Phoenix Const. Co. v. Witt & Saunders, — Tex. Civ. App. —, 190 S. W. 780.

79. In re Walter B. Jenkins, 2nd A. R. U. S. C. C. 239.

§ 570. **Preference of Compensation Claims.**—The acts of a majority of the states contain provisions to the effect that in case of the insolvency or bankruptcy of the employer the claims of injured employees under the act will be given preference over claims of general creditors. Eight states give claims against insolvent employers the same preference as claims for unpaid wages for labor.[80] One state gives the same preference against employer's assets as allowed for unpaid wages earned within three months of the date of insolvency.[81] Six states give the same preference for the whole amount as is given to unpaid labor.[82] One gives the same preference, but does not give any priority over previously recorded mortgages or conveyances of land, and the lien dates from the time of filing a copy of the agreement with the court of Common Pleas, and is not divested upon an appeal of the case.[83] One state gives the same right but does not prejudice any securities which are superior to general creditors.[84] Four states give a like preference, but do not impair a lien created by any previous award.[85] Two states provide that judgments in compensation cases have the same preference against employers' assets as a claim for taxes.[86] One provides that judgments are a prior lien over all other judgments and liens, except those now existing.[87] In one state an award of the board filed with the recorder of deeds is, in case of the employer's insolvency, a lien on all his property, subsequent only to liens for taxes, wages, mortgages and trust deeds.[88] In one state a claim for compensation is a first lien on all property of the employer liable there-

80. Arizona, Delaware, Indiana, Minnesota, New Hampshire, New Jersey, South Dakota and Virginia. Steel & Iron Mongers, Inc., v., Bonnite Insulator Co., — N. J. Ct. of Chancery, —, 106 Atl. 380, 4 W. C. L. J. 121.

81. Connecticut.

82. Idaho, Hawaii, Kentucky, Louisiana, New York, Nebraska, but not to become lien on property of third persons.

83. Pennsylvania.

84. Tennessee.

85. California, Maine, Rhode Island, Wisconsin.

86. Ohio and Utah.

87. North Dakota.

88. Illinois.

for and paramount to all other liens and claims except for wages and taxes.[89] One state makes a claim for compensation a lien on all deposits made by the employer, and if necessary on all the employer's property, with preference over all other creditors except other lienors.[90] One state gives claims for premiums due on an insurance policy covering workmen, a priority over all claims except taxes.[91] One gives the territorial treasurer a right to attach and sell property of an employer who fails to pay his insurance premiums.[92] One gives a compensation claim the same preference or priority against the employer's assets as allowed by section 2657 of the public statutes (sec. 93.) of the state.[93] The acts of thirteen states makes no provision for priority payments.[94]

The employer being primarily liable, the insolvency of the insurer will not relieve him from responsibility, even though he has provided insurance as provided for by the provisions of the act.[95]

Where a claim for compensation had been commuted to a lump sum, under the New Jersey act, it was held that this claim should be given preference over other creditors of the bankrupt estate of the employer.[96]

"The preference given by section 22 of the New Jersey Workmen's Compensation Act (C. S. N. J., 1st Supplement, p. 1638) is, in the case of insolvent corporations, under section 83 of an Act Concerning Corporations (2 C. S. 1910, p. 1650), confined to an amount representing the weekly award for the two months preceding the institution of the proceedings in insolvency.

89. Michigan.
90. Montana.
91. Washington.
92. Porto Rico..
93. Vermont.
94. Colorado, Alaska, Iowa, Kansas, Maryland, Massachusetts, Nevada, New Mexico, Oregon, Texas, West Virginia, Wyoming, and the United States.
95. American Fuel Co. v. Indus. Comm., — Utah, —, (1920), 187 Pac. 633, 5 W. C. L. J. 616.
96. Brzinski v. Acme Body Co. U. S. Dist. Ct. of N. J., — Fed. —, 37 N. J. L. J. 183.

"It is difficult to understand precisely what the Legislature meant by the language used in section 22 of the Workmen's Compensation Act. If it had been intended to give a general preference to the amounts awarded as compensation, clear language expressing such purpose might have been used. The term 'right of compensation,' used in section 22, must, of course, refer to the amounts awarded as compensation. The same preference then is given to the claimant for such amounts as is allowed by law for a claim for unpaid wages for labor. The claim for unpaid wages for labor allowed in the case of insolvent corporations is prescribed by section 83 of the Corporation Act, and is for claims for labor for a period not exceeding two months prior to the institution of the proceedings in insolvency. Labor is therefore given but a limited preference. A holding that the entire amount of the award for compensation under the Workmen's Act is entitled to preference would require a disregard of the limited preference given to labor, and of the fact that if such had been intended apt and clear language was available to express such an intent. While the award may not be considered in all respects as wages accruing, the award being in reality for injuries sustained, yet in order to make effective, in any way, the provisions of section 22, I think that, for the purpose of that section, the award must be considered as in the nature of wages, and the preference is confined to the amount accrued and unpaid, computed at the weekly rate for the two months preceding the institution of the proceedings in insolvency."[97]

§ 571. **Double Compensation.**—Where an employee suffered injuries to his head and was awarded compensation for temporary total and permanent partial disability, he could not also be awarded compensation for permanent disfigurement under section 8, par. (c), of the Illinois Act, as amended in 1915, which amendment provides compensation for permanent disfigurement to the hand, head or face, but provides that there shall be no compensation payable under paragraphs d, e, or f, and where

97. Steel & Iron Mongers, Inc. v. Bonnite Insulator Co., — N. J. —, (1919), 106 Atl. 380, 4 W. C. L. J. 121.

compensation is payable under these paragraphs it is erroneous to allow compensation for disfigurements.[98] Prior to the amendment of the Illinois Act the opposite view prevailed.[99]

"May children who are now receiving compensation for the death of their natural father receive additional and concurrent compensation through the death of their stepfather? The Legislature has authority to determine the various classes of persons who are entitled to compensation, as dependents, upon the injury or death of an employee, and the amount to be paid such dependents. When it has so determined, the court cannot change or amend either the classification or the amount to be paid. In section 307 of the Pennsylvania Workmen's Compensation Act (Acts 1915, p. 736):

'The terms "child" and "children" shall include stepchildren and adopted children, and children to whom the employee stood in loco parentis, if members of the decendent's household at the time of his death.'

"The referee finds that decedent not only stood in loco parentis to these children, who were members of his household at the time of his death, but that they were also dependent upon him. This conclusion would seem to fix their right to compensation through the stepfather. We find nothing in the act that prohibits this dual compensation. Moreover, it would seem to be expressly permitted. Section 204 reads:

"That 'the receipt of benefits from any association, society, or fund shall not bar the recovery of damages by action at law, nor the recovery of compensation under article three hereof: and any release executed in consideration of such benefits shall be void.' "[1]

98. Smith-Lohr Coal Mining Co. v. Indus. Comm., — Ill. —, (1920), 126 N. E. 164, 5 W. C. L. J. 669; Stubbs v. Indus. Bd., 117 N. E. 419, 1 W. C. L. J. 14.

99. Watters v. Kroehler Mfg. Co., 187 Ill. App. 548, 8 N. C. C. A. 352; Kannenberg v. Deere & Mansur Co., 203, Ill. App. 607, 16 N. C. C. A. 482; Stevenson v. Ill. Watch Co., 186 Ill. App. 548, 8 N. C. C. A. 858.

1. Decker v. Mohawk Min. Co., — Pa. —, (1920), 109 Atl. 275; 5 W. C. L. J. 889.

If an injured servant continued to work from the time of his injury at the same wages until the job was finished, and at his own request was then given a different job at less wage, but receiving the full wage of a well man, he was not entitled to an award under the compensation act.[2]

Where a workman was partially incapacitated through an injury to his shoulder, in addition to losing a leg, the court, in holding that he was entitled to separate awards for the two injuries, said: "In Franko v. Schollhorn Co., 104 Atl. 485, just decided, we construed section 11 of our act as providing one form of compensation during total incapacity and another for the permanent loss of a member of the body. The injury to the shoulder was a distinct injury, resulting in total incapacity; the loss of the leg was also a distinct injury, resulting in partial incapacity. For each injury, under our construction of this section, the injured employee was entitled to compensation. The fact that each injury resulted from one accident did not make of these a single injury. Nor did the act intend that compensation for the loss of a member should be in lieu of all compensation for other injuries resulting from one accident. The superior court in New Haven county, in Foley v. Demarest & Company, pointed out with great force that a contrary construction, carried to its logical conclusion, might limit the compensation in a case of total incapacity to practically nothing. For example: An injury attended with blood poisoning might incapacitate for an entire year, and the injured person would be entitled to compensation for that period, provided no amputation were necessary; but, if such injury was attended with the loss of a small toe or the phalanx of the fourth finger, compensation would be limited to from six to thirteen weeks. Our act does not permit double compensation, and hence the trial court was correct in making these awards consecutive; the award for the total incapacity to precede in payment that for the partial incapacity."[3]

2. Humphrey's v. Chevrolet Motor Car Co., 181 N. Y. Supp. 3, (1920), 5 W. C. L. J. 878.

3. Olmstead v. Lamphier, — Conn. —, 104 Atl. 488, 2 W. C. L. J. 774; Franko v. Wm. Schollhorn Co., — Conn. —, 104 Atl. 485, 2 W. C. L. J.

But where an employee was injured, necessitating the amputation of a phalanx of a finger on the day of the injury, it was held that the employee was not entitled to an award for total incapacity in addition to compensation for the specific loss of the phalanx, for there was but one injury, inasmuch as incapacity immediately followed and resulted from the loss of the phalanx, and compensation for the loss of the phalanx being "in lieu of all other payments" for such injury.[4]

"A wife not being a party in interest to the proceeding by her husband during his lifetime, plaintiff's subsequent claim, or new cause of action' arising from his death, was not beneficially or detrimentally affected through anything done by him in his proceeding, except a possible reduction of her claim by reason of payments actually made to him. Aside from this, whether her husband's death immediately followed the accident, or he lived to institute proceedings for compensation in his own behalf, her claim based on a new, original right arising from his death was the same."[5]

Under the New York act, "Concurrent awards may be made, one for serious facial or head disfigurement, and one for disability or loss of earning power. If so made, then it should clearly appear that the award for facial or head disfigurement does not include anything for diminished earning power."[6] Prior to the amendment of the New York Act, providing for disfigurement, such cases were governed by the common law.[7]

Where a servant, after recovering compensation under the act, sought, in an action at law, to recover for disfigurement the court

770; Saddlemire v. Amer. Bridge Co., — Tenn. —, (1920), 110 Atl. 63, 6 W. C. L. J. 130.

4. Kramer v. Sargent & Co., — Conn. —, 104 Atl. 490, 2 W. C. L. J. 777.

5. Curtis v. Slater Cons't. Co., — Mich. —, 168 N. W. 958, 2 W. C. L. J. 909.

6. Erickson v. Preuss et al., 223 N. Y. 365, 119 N. E. 555, 16 N. C. C. A. 481.

7. Shinnick v. Clover Farms Co., 169 App. Div. 236, 154 N. Y. S. 432, 9 N. C. C. A. 342.

said: "The whole object and purpose of the legislature would be overthrown if the servant might, after obtaining compensation from his master as provided by the statute, then sue in the courts for further compensation because of disfigurement or pain and suffering."[8]

Where an employee was scalped in the course of her employment, compensation for disfigurement, in addition to disability damages received in a common law action, was disallowed. But subsequent to this decision the Louisiana Act has been amended so as to include compensation for disfigurement of the head and face.[9]

Under the Workmen's Compensation Law of New York, an employee suffering permanent partial disability by loss of a finger, and total disability through injuries to other fingers, may recover for permanent disability, but cannot also receive compensation for temporary total disability, but a provision that compensation for certain specific injuries shall be in lieu of all other compensation, does not exclude compensation for injuries defined in other paragraphs of the act.[10]

The Rhode Island Workmen's Compensation Act, which provides that an employee injured through the negligence of a third party shall not recover from such third party and also recover under the workmen's compensation act, does not preclude an employee from suing such third party, when the employee has received compensation under an agreement filed in and approved by the court that the employee shall sue such third party and return compensation in the event of a recovery from the third party.[11]

Compensation may be awarded for permanent partial and temporary partial at the same time where they result from different injuries, but where they result from the same injuries it would

8. Conners v. Semet-Solvay Co., 94 N. Y. Misc. 405, 159 N. Y. Supp. 431, 16 N. C. C. A. 483.

9. Boyer v. Crescent Paper Box Factory, 143 La., —, 78 So. 596, 16 N. C. C. A. 484.

10. Marhoffer v. Marhoffer, 220 N. Y. 543, 116 N. E. 379.

11. Mingo v. Rhode Island Co., — R. I. —, 103 Atl. 965, 2 W. C. L. J. 562.

amount to double compensation to allow compensation for both classes of disability at the same time.[12]

§ 572. **Penalties.**—"By section 5a, pt. 2, p. 284, of the Texas act it is provided that, should the insurer, without justifiable cause, refuse to make prompt payment of the assessments decreed by the Industrial Accident Board as the same mature, then the injured employee, or his beneficiary shall have the right to mature the entire claim and to institute suit thereon to collect the full amount of the award, together with 12 per cent. penalty and attorney's fees. While plaintiff did allege in his petition such a failure on the part of defendant, coupled with an allegation of his right thereby to mature the entire amount of his claim, yet the trial judge did not submit to the jury the issue whether or not the defendant had, 'without justifiable cause,' refused to pay said awards, and no complaint is made by the appellee here of the failure of the court to submit that issue. Furthermore, as shown by plaintiff's petition, he was not willing to abide by the decision of the Industrial Accident Board, and instituted this suit under the provisions of section 5, pt. 2, p. 283, of the act, according to the terms of which the decision of the board was thereby abrogated, and exclusive jurisdiction to determine the controversy was vested in the court in which the suit was instituted. Plaintiff could not thus repudiate and abrogate the ruling of the Industrial Accident Board, and at the same time treat it as effective and binding upon the defendant and seek to hold it liable for a lump-sum settlement of his claim by reason of its failure to comply with mandates of the board."[13]

Section 67 of the Indiana Workmen's Compensation Act (Acts of 1915, p. 392) is to the effect that every employer shall keep a record of all personal injuries suffered by his employees in the course of their employment, and that within certain specified times certain reports of the facts shall be made in writing by the employer involved in each case, and mailed to the Industrial

12. Slago Coal Co. v. Indus. Comm., — Ill. —, (1920), 127 N. E. 757, 6 W. C. L. J. 292.

13. U. S. Fid. & Guar. Co. v. Davis, — Tex. Civ. App. —, (1919), 212 S. W. 239, 4 W. C. L. J. 310.

Board on blanks to be procured from the board for that purpose, and that any employer who refuses or neglects to make such reports "shall be liable for a penalty of not more than twenty-five dollars for each refusal or neglect, to be recoverable in any court of competent jurisdiction in a suit by the board." The venue of an action to enforce the statutory penalty for a failure to comply with the provisions of the act requiring the making of a report, lies in the county of the employer's business.[14]

An employer is not liable to penalty for delinquency in making payments until the obligations of the employer is definitely ascertained, where there is a reasonable controversy as to the liability for further payments.[15]

The fact that policies of accident insurance were issued under the workmen's compensation act, does not affect the application of the general statutory penalty which provides for the payment of twelve per cent damages for failure to pay promptly.[16]

Under the Wisconsin Act, failure to guard a pulley which was exposed to contact justifies increased compensation in the way of a penalty.[17]

Where under the Nebraska Act an employer appealed from an award and it was affirmed by the district court which allowed the statutory increase of 50 per cent for all delinquent payments, as a penalty and the employer appealed from the decision, and it was affirmed in the Supreme Court, the employer was liable for the "statutory waiting period" from the date of such judgment, for the full period of time allowed by the Act, until it was paid under the mandate issued by the Supreme Court. When the appeal is not based on such a reasonable controversy as would jus-

14. In re Burk, — Ind. App. —, 118 N. E. 540, 1 W. C. L. J. 597.

15. Updike Grain Co. v. Swanson, — Neb. —, (1920), 178 N. W. 618, 6 W. C. L. J. 469; Osborn v. Omaha Structural Steel Co., — Neb. —, (1920), 179 N. W. 1022, 7 W. C. L. J. 213; Hall v. Germantown State Bank, — Neb. —, (1921), 181 N. W. 609.

16. Southern Surety Co. v. Nelson, — Tex. Civ. App. —, (1920), 223 S. W. 298, 6 W. C. L. J. 508; Southern Surety Co. v. Stubbs, 199 S. W. 343.

17. Eau Claire Sand & Gravel Co. v. Indus. Comm., — Wis. —, 181 N. W. 718.

tify an appeal, ignorance of the law is no shield from liability for its infraction.[18]

§ 573. **Attorneys.**—Under the Ky. St. Supp. 1918, sec. 4942, the Workmen's Compensation Board is given the power to reduce the compensation agreed upon by the employee and his attorney although the amount, agreed upon as attorney's fees, does not exceed the statutory allowance, and the evidence fails to show that the employment was solicited. And an aggrieved attorney may appeal from the decision of the board to the circuit court. When there is no contract price agreed upon the Board may also fix the attorney's fees at a reasonable sum.[19]

Where an injured employee had given a receipt releasing his employer from liability in consideration of payments on a settlement, and his attorney filed a petition for additional compensation, which was denied on presentation of the receipt, it was held that the attorney was not entitled to recover attorney's fees from the employee under the workmen's compensation act.[20]

In discussing the question of attorneys' liens and fees under the Iowa act, the Supreme court of that state said: "Now the Compensation Act does not create or impose upon the employer any liability to the attorney of his employee. That liability exists, if at all, because of another statute. The sole reference thereto in the Compensation Act is found in Code Supp. Sec. 2477m20, where it is said that no claim for the service of any attorney in securing a recovery under this statute shall be an enforceable lien thereon, unless the amount of the same be approved in writing by a judge of a court or by the Iowa Industrial Commission. The effect of this provision is to so limit the operation of the general statute relating to attorney's liens hereinafter quoted that they may be enforced against employers under the protection of the written approval of a judge or of the Industrial Commission. In other words, to have a valid lien in such cases, the attorney must

18. Abel Const. Co. v. Goodman, - - Neb. —, (1921), 181 N. W. 713.

19. Rawlings v. Workmen's Compensation Bd., — Ky. App. —, (1920), 218 S. E. 985, 5 W. C. L. J. 699.

20. Johanson v. Lundin Bros., — Minn. —, (Dec., 1919), 175 N. W. 302, 5 W. C. L. J. 414.

show compliance with the general statute on the subject of attorneys' liens, plus the observance of the requirements of Code Supp. sec. 2477m20. The general statute to which we refer reads as follows:

" 'An attorney has lien for compensation upon: * * * Money due his client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed, from the time of giving notice in writing to such adverse party, or attorney of such party, if the money is in the possession or under the control of such attorney, which notice shall state the amount claimed, and, in general terms, for what service.' Code, sec. 321.

"It will be remembered that, according to the agreed statement of facts, at the date of settlement with Owens, no proceeding or action had been begun by Owens, or by plaintiff in his behalf, and under the provisions of this statute, plaintiff had not then acquired any lien, and, the money having been then paid, he could not thereafter acquire one.

"Again it is provided that the lien shall date only from the time of giving notice thereof in writing to the adverse party, and it is conceded that no such notice was ever served on the appellee. These facts would seem to be conclusive against the assertion of a lien by the plaintiff in this case.

"He argues, however, that notice to the employer is sufficient because of the provisions of Code Supp. sec. 2477m47, by which the insurer is bound by the knowledge and notice possessed by the employer and jurisdiction of the employer is jurisdiction of the insurer, and that insurer is bound by any award or judgment against the employer. But as we have already pointed out, this provision is clearly limited to the binding effect upon the insurer of every liability established against the employer in favor of the employee under the Compensation Act, and the judgment obtained below by the attorney against the employer for the amount of his alleged lien is neither a judgment nor award in favor of

the employee, and does not relate to any liability imposed by the Compensation Act."[21]

"The Illinois statute provides for attorney's fees where the employer does not institute proceedings for a review and refuses to pay compensation. McMurray v. Peabody Coal Co., 281 Ill. 218, 118 N. E. 29. There is no constitutional objection to such a statute, and the facts authorized the allowance. The purpose of the statute is to provide a speedy method for the adjustment of compensation and the payment of the same, without the delays of litigation and the burden of expense and attorney's fees otherwise imposed upon claimants."[22]

Agreements between injured employees and their attorneys regarding fees of the latter require the approval of the industrial board to render them valid in Michigan, and such a requirement is not violative of the Michigan Constitution, Act. 2, sec. 12, relating to the suitor's prosecution or defense by an attorney of his choice, for, "The Industrial Accident Board is not, in contemplation of law, a court, and a claimant before it for damages resulting from personal injuries is not strictly a 'suitor in any court,' but the right of a claimant to select and employ an attorney or agent to represent him in the matter is recognized by the provision referred to. These restrictions in the act, as applied to those who submit to its provisions by election, certainly cannot be held unconstitutional. They were deemed by the Legislature proper and necessary to safeguard the interests of the class for whose benefit largely this act to 'promote the welfare of the people of the state' was passed; they are germane to the purpose of the act, and in the light of conditions previously existing in litigation over personal injuries to workmen, of which courts of last resort have taken judicial notice in construing Workmen's Compensation Acts, are beneficial and appropriate, if not essential, to an efficient administration of the law. Hawkins v. Bleakley, (D. C.) 220 Fed. 378), Cunningham v. Improvement Co., supra (44 Mont. 180, 119 Pac. 554), Justice Sterling in Ayers v. Buckeridge,

21. Kratz v. Holland Inn, — Iowa —, (1919), 173 N. W. 292, 4 W. C. L. J. 487.

22. Friedman Mfg. Co. v. Indus. Comm of Ill., 284 Ill. 554, 120 N. E. 460, 3 W. C. L. J. 21, 17 N. C. C. A. 1062.

(1902), 48 K. B. 57." A proceeding before an industrial accident board to fix the amount of fees of claimant's attorney is a special statutory proceeding and an exercise of police power, and neither the board nor the court upon certiorari can enter judgment for return of excess fee taken under alleged contract over the amount approved by the board.[23]

In construing the Washington law on the subject of attorney's fees in compensation cases on appeal, the supreme Court of that state said: "The right of a litigant to recover his attorney's fees from the opposing party is a statutory right. It did not exist at the common law. The statute cited as bearing upon the question (Rem. Code, sec. 6604-20), relates to appeals from the orders of the Industrial Insurance Commission to the superior court. No statute authorizes the allowance of attorney's fees on an appeal from the superior court to the Supreme Court. There being no statute granting the right, it is beyond the power of either the superior court or this court to make an allowance of attorney's fees for such an appeal. See Boyd v. Pratt, 72 Wash. 306, 130 Pac. 371."[24]

The Illinois statute gives no authority to allow an attorney's fees to be taxed against the party paying the compensation, unless such party refuses to pay the compensation or some installment thereof when it becomes due.[25]

In a Minnesota case the Supreme Court of that state said: "The court allowed plaintiff's attorneys a lien in the sum of $400 upon the amount recovered. The relator raises no question concerning this lien except to call attention to the fact that if plaintiff is not entitled to recover her attorneys are not entitled to a lien as against the relator. The amount for which the lien is allowed in this case is not questioned by any one and hence is not before us for consideration; but we wish to call attention to the fact that the proceedings under this law are informal and sum-

23. May v. Chas. Hoertz & Son, — Mich. —, (1919), 170 N. W. 305, 3 W. C. L. J. 484; Mackin v Detroit-Timkin Axle Co., 187 Mich. 8, 153 N. W. 49.

24. O'Brien v. Indus. Ins. Dept., — Wash —, 171 Pac. 1018, 2 W. C. L. J 171, 16 N. C. C. A. 663.

25. McMurray v. Peabody Coal Co., — Ill. —, 118 N. E. 29, 1 W. C. L. J. 324, 17 N. C. C. A. 1061.

mary and are intended to be inexpensive; and that only extraordinary circumstanese will justify the court in allowing a lien for any considerable proportion of the compensation awarded the dependent."[26]

The Minnesota Act, Section 8201, now provides in part as follows: "The allowance of attorney's fees is not authorized by the Minnesota Act, but the court may allow statutory costs, although designated in the order as attorney's fees."[27]

An attorney employed by an employers' indemnity insurance company to defend an action by an injured employee against the employer is not an agent of the employer appointed by the insurer for the benefit of the insured, where the insurer had exclusive control of the defense. But the insurance company is responsible to the insured employer for any negligence of an attorney at law employed by it in the defense of the action.[28]

An attorney for dependents may properly file a claim for compensation in behalf of such dependents.[29]

Where one instituted proceedings for compensation in behalf of an alien father, claiming to act as attorney in fact for the parent to whom such attorney in fact bore no relation, and relied for his authority upon an unauthenticated letter received by him from the father, which letter was not written nor signed by the father, but for him by another, the court held that the party attempting to act as attorney in fact had no legal authority to file the application.[30]

There is no legal error in the award of $125 counsel fee generally, when in the contemplation of the statute this is to be paid from the award.[31]

26. State ex rel. London & Lancashire Indemnity Co. v. District Court of Hennepin County 139 Minn. 409, 166 N. W. 772, 1 W. C. L. J. 835, 17 N. C. C. A. 1060.

27. State ex rel. Duluth Diamond Drilling Co. v. District Ct., 129 Minn, 423, 152 N. W. 838, 9 N. C. C. A. 1119.

28. Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co., 153 C. C. A. 377, 240 Fed. 573, 17 N. C. C. A. 1068.

29. In re Pagnoni, — Mass. —, 118 N. E. 948, 17 N. C. C. A. 159.

30. Western Indem. Co. v. Indus. Acc. Comm., — Cal. App. —, 169 Pac. 261, 16 N. C. C. A. 804.

31. Diskon v. Bubb, 88 N. J. L. 513, 96 Atl. 660, 17 N. C. C. A. 1060.

Construing section 13 of the Massachusetts Act relating to attorneys' fees, the Supreme Court of that state said: "If a legal representative was appointed to administer property left by the deceased employee, the insurer would not be held to reimburse that person for money paid for legal services rendered him in the recovery of the compensation which, under the statute, is to be paid by him to dependents or other persons entitled thereto.

"We are of opinion section 13 does not place such a burden upon the insurer in case a legal representative not otherwise necessary to be appointed is appointed to receive and distribute the compensation in accordance with 'the provisions of this act,' and that the duty placed upon the insurer by the terms of the statute is limited to the 'necessary disbursements for such appointment, the necessary expenses of such legal representative, and reasonable compensation to him for time necessarily spent in carrying out' the provisions of the statute that, 'if the payment is made to the legal representative of the deceased employee, it shall be paid by him to the dependents or other persons entitled thereto under this act.'"[32]

Where the superior court awarded attorney's fees to the extent of $60 under the Washington Act, and a motion was made in the supreme court for additional fees on account of claimant having been subjected to the expense and delay of an appeal, the supreme court held that the only warrant for fixing attorney's fees at all was limited to the superior court.[33]

The industrial commission found that the reasonable value of an attorneys services was $25, and awarded that amount, directing the petitoner to pay it directly to the attorney. It was contended that the compensation act did not authorize the allowance of a sum of money to be paid directly to an attorney. The court held that the petitioner was not injured by such an award as it was deducted from the compensation to be paid, and that the

32. Mellon's Case, — Mass. —, 121 N. E. 18, 17 N. C. C. A. 1063, 3 W. C. L. J. 142.

33. Boyd v. Pratt, 72 Wash. 506, 3 N. C. C. A. 604, 130 Pac. 371.

method adopted by the commission seemed to be the only available one.[34]

Under the Nebraska Act the court has no authority to assess an attorney's fee as costs, since provision is made for the county attorneys of the several counties and the Attorney General of the state to appear as counsel for claimants for compensation.[35]

In disposing of the question whether an attorney had the right to appeal from an order of the board approving or disapproving attorney's fees under the Indiana Act, the court said: "The act nowhere makes any express provision for an appeal from an order approving or disapproving attorney fees, and we fail to find any provision from which any such right can be properly implied. Certainly a provision for an appeal from an award growing out of a disagreement between an employer and an injured employee, with reference to the latter's compensation, cannot be so construed as to imply the right of appeal in a collateral matter, based on the action of the board in approving or disapproving attorney fees, which must necessarily arise out of an express or implied contract, between the injured employee and his attorney. The two matters are so far unrelated as to forbid such an implication. We therefore conclude that there is no authority for an appeal from an order of the Industrial Board approving or disapproving attorney fees. * * *

"But even if the law were otherwise, with reference to the question we have been considering, we would still be compelled to dismiss this appeal on the ground stated by appellee. The statute only provides for an appeal from an award by the full board. Acts 1917, p. 155. The record in this case fails to disclose any award from the full Industrial Board, and hence an appeal is unauthorized."[36]

Attorneys in Missouri have no lien in a claim against a Kansas employer, where the employer settled with the employee under the

34. North Pac. S. S. Co. v. Indus. Acc. Comm., 174 Cal. 500, 163 Pac. 910, 17 N. C. C. A. 1065, A. 1 W. C. L. J. 170.

35. U. S. Fidelity & Guaranty Co. v. Wickline, — Neb. —, 170 N. W. 193, 17 N. C. C. A. 1065.

36. Galvin v. Brown, — Ind. App. —, 121 N. E. 447, (1919), 17 N. C. C. A. 1066.

Kansas Act after notice of the employment of the Missouri attorneys, it having been held that the action which had been begun in Missouri could not be maintained because the case was governed by the Kansas act.[37]

In a case where the award was modified upon rehearing and the employee allowed compensation as for three-fourths of total permanent disability, an attorney's fee of $75 was allowed.[38] Where an award was $6.54 for 150 weeks an attorney was allowed a fee of $50, to be paid from the compensation at the rate of $2.50 a week.[39] A $30 fee was allowed to an attorney in a proceeding for commutation of an award. [40]

Under the New Jersey Act a fee of $150 was allowed to an attorney for services in a proceeding wherein a boy was allowed 75 per cent. of 50 per cent. of his daily wages during 200 weeks, with a minimum of $5 per week.[41]

In a New York case the court said that, "irrespective of whether he has recovered from the third party, an employee cannot sue his employer for his medical expenses, although the statute (section 13) requires, the employer, after notice, to furnish such services. Semmen v. Butterick Publishing Co., 101 Misc. Rep. 285, 166 N. Y. Supp. 993, approved in Goldflam v. Kazemier & Uhl, Inc., 181 App. Div. 140, 168 N. Y. Supp. 87. Nor can a doctor or attorney who has rendered services to the injured employee sue his employer therefor. Bloom v. Jaffe, 94 Misc. Rep. 222, 157 N. Y. Supp. 926; Hirsch v. Zurich, General A. & L. Ins. Co., Ltd., 97 Misc. Rep. 360, 161 N. Y. Supp. 380. All these decisions are based on the fact that no such right of action is given by the statute, and that, on the contrary, the statute makes such expenses a part of the compensation provided, and the amount thereof a lien upon the compensation fund."[42]

37. Platt v. Swift & Co., 188 Mo. App. 584, 176 S. W. .434.

38. O'Connell v. Simms Magneto Co., 85, N. J. L. 64, 89 Atl. 922, 4 N. C. C. A. 590; Ulaski v. Morris & Co., — Neb. —, 184 N. W. 946, (1921).

39. Endler v. Guenther, 37 N. J. L. J. 114.

40. O'Connor v. Babcock & Wilcox Co., 37 N. J. L. J. 275.

41. Voorhees v. Stickle, 38 N. J. L. J. 143.

42. Louis Bossert & Sons v. Piel Bros., 182 N. Y. S. 620, (1920), 6 W. C. L. J. 372.

"Where a statute allows the employee to recover attorney's fees, in case an order for compensation is made in his favor, and in event the employer refuses to abide by the order, but appeals, and on appeal fails to reduce the award it is held under the Nebraska Act that, the power to allow attorney's fees being statutory, the court has no authority to allow them where the employee himself appeals, though by such appeal the award is increased, nor to allow fees where it is shown that the employer, upon the rendition of the award, instead of appealing, offers to pay it."[43]

The California Industrial Commission has authority to pass upon the reasonableness of an attorney's fee, but does not have power to determine the legality of a contract for the payment for services in independent proceedings, although the contract is made payable out of the award of compensation made by the commission. An attorney is entitled to a fair hearing before the commission on the question of the reasonableness of the fee agreed upon.[44]

Under the laws of New York 1920 ch. 529, collection of a fee by an attorney in compensation cases, without the approval of the commission is made a misdemeanor and the solicitation of compensation cases is prohibited. The New York compensation act provided: (since amended by Laws of 1917, Chapter 705), "Claims for legal services in connection with any claim arising under this chapter, and claims for services or treatment rendered or supplies furnished pursuant to section 13 of this chapter, shall not be enforceable unless approved by the commission. If so approved, such claim or claims shall become a lien upon the compensation awarded but shall be paid therefrom only in the manner fixed by the commission." (Consol. Laws, chap. 67 (Laws of 1914, chap. 41), Par. 24.)" An attorney informed a compensation claimant after an award in his favor and motion for rehearing, that he would not continue to act as his attorney unless he received some security or guaranty that he would receive the 50% agreed upon in their written contract. Claimant's brother then made a contract of employment with the attorney at the latter's suggestion, whereby the brother

43. Updike Grain Co. v. Swanson, — Neb. —, (1920), 178 N. W. 618, 6 W. C. L. J. 469; Derr v. Kirkpatrick — Neb. —, 184 N. W. 91.

44. Schilling v. Indus. Acc. Comm., — Cal. App. —, (1920), 190 Pac. 373, 6 W. C. L. J. 268.

deposited $500.00 in trust for the attorney to await the final outcome of the claimant's case, and to be used to pay the attorney his 50%. An award of $864.90 was made in claimant's favor and the commission fixed the attorney fee at $150.00. The attorney then brought suit on the contract with the claimant's brother, to collect from him the 50% of the award, having refused to accept the $150.00 allowed by the commission. The attorney recovered in the lower court. The appellate court said: "We cannot approve a course of conduct which appears to us to be a palpable evasion of one of the great purposes of the act. If it be understood that the courts approve the action of an attorney in procuring a third party to agree to pay to him an amount equal to 50 per cent of the recovery it is quite obvious that that third party will in some way or other recover it from the workman, and so the workman will in the end be no better off in this regard than if this remedial legislation had not been passed. Members of the bar should honestly, straightforwardly and sincerely aid in the carrying out of this beneficent legislation and if they are unwilling to do the work for the amount allowed by the Commission they should stand aside and let others do it.

"We do not think under the circumstances disclosed by this record, especially since it is the first case of the kind that has come before this court, that we should discipline the respondent. We do think, however, it is our duty to warn the profession that we regard such conduct, or the use of any means which the wit of man may devise by which a larger amount of the recovery shall go to an attorney than that fixed by the Commission as improper, unethical and deserving of disciplinary action. We think it clear that we ought to take this stand in support of this legislation and that hereafter we shall act upon such offenses accordingly.

"With these words of warning the present proceeding is herewith dismissed."[47]

"Adolph Nelson was accidentally drowned in the course of his employment in 1915, and liability for his death accrued under the Employers' Liability Act of 1913, before the adoption of the amendment of March 28, 1917 (Vernon's Ann. Civ. St. Supp. 1918,

47. In re Fisch 188 N. Y. App. Div. 525.

arts. 5246-1 to 5246-91). The act of 1913 contained no provision for the payment of penalties or attorney's fee, as does the amendment of 1917. The Court of Civil Appeals was of the opinion that article 4746 of Vernon's Sayles' Texas Civil Statutes authorized the imposition of the 12 per cent. Penalty. * * * In refusing to pay the claim of defendants in error until it was established in a court of competent jurisdiction, plaintiffs in error exercised a right plainly and unqualifiedly conferred upon them by the statute; and their act cannot be made the basis for the imposition of a penalty."[48]

It has been held that a judgment will be enjoined for fraud of the plaintiff's attorney in breaching his promise to notify the defendant's counsel when the case was called.[49]

§ 574. **Costs.**—The acts are not uniformly specific as to the powers of the commission and boards in the matter of taxing and requiring security for costs.

In a Washington case the court stated the general rule in reference thereto as follows: "Being dependent upon the statute, costs and witness fees are never to be allowed in the discretion of the trial judge, in the absence of a positive or permissive statute. In re Queen, 82 N. Y. En. 588, 89 Atl. 860; Struthers v. Christal, 3 Daly 327; Wallace v. Sheldon et al., 56 Neb. 55, 76 N. W. 418. So it is held that—'Sums paid for compensation of expert witnesses beyond ordinary fees authorized by statute for witnesses generally are not taxable as costs, 15 C. J. 131; 5 Standard Encl. Proc. 951."[50]

Security for costs is not allowed under the Alberta Act.[51]

Where it appears that the appellant is without means to pay costs in the event of the appeal failing, the respondent is entitled to an order requiring security.[52]

48. Southern Surety Co. et al. v. Nelson, — Tex. —, 229 S. W. 1113.

49. Huddleston et al. v. Texas Pipe Line Co., — Tex. Civ. App. —, 230 S. W. 250.

50. Nelson v. Industrial Insurance Dept., — Wash. —, 176 Pac. 15, 17 N. C. C. A. 1057.

51. Cessarini v. Hazel, 7 B. W. C. C. 1059.

52. Brine v. May, Ellis, Grace & Co., 6 B. W. C. C. 134.

To determine whether or when attorneys fees may be taxed as costs it is necessary to examine the provisions of the acts.[53]

Under the Iowa Act the fees of arbitrators are properly assessed against an employer, he to pay them in the first instance, and deduct one-half of that amount from any compensation found to be due to the employee.[54]

In assessing the costs of the appeal against the successful appellant in a Texas case the court said: "Also, appellant by motion to retax the costs shows that without stating a cause on the record, the judgment as affirmed is for a less amount than the judgment in the county court at law, and insists that it is entitled to recover costs of this appeal under article 2046, Vernon's Sayles' Civil Statutes. Article 2048, Vernon's Sayles' Civil Statutes, provides that the court may, for good cause, to be stated on the record, adjudge the costs otherwise than as under article 2046. We did adjudge the costs otherwise than as provided in said article, but did not state the cause of record. If above articles apply to appellate courts, we say: The Industrial Accident Board, on a hearing at which appellant was a party, awarded appellee the sum of $2.25 per week for 300 weeks on account of 50 per cent permanent partial incapacity for work. Without having taken an appeal from the action of the Accident Board, Appellant refused to make payment of the weekly amounts as they became due and payable until the sum of $306 at the time of the trial had become due, and on the trial sought to have the award set aside and held for naught. It occurred to this court on the trial on the appeal, and does now on the hearing on this motion, that appellant's refusal to pay the weekly amounts awarded as they fall due was and is arbitrary and without good reason. No suggestion of a valid defense against the payment of the weekly amounts as they become due, as awarded, appears on the record. Appellant's failure and refusal to pay said award necessitated the suit by appellee to recover the amounts then due. These facts

53. McMurry v. Peabody Coal Co., — Ill —, 118 N. E. 29, 1 W. C. L. J. 24.

54. Fischer v. W. F. Priebe & Co., 178 Iowa 512, 160 N. W. 48, A 1 W. C. L. J. 586.

appear to this court to be "good cause" for taxing the costs of this appeal against the appellant.[55]

Where under the New York Act the phase of the case upon which a reversal was based upon appeal was not presented by the appellant the reversal will be without costs.[56]

Where an insurer appealed from a judgment of the district court allowing a lump sum, the costs were properly adjudged against the appellant.[57]

"In an action under the Nebraska Act, even though recovery be had, an attorney's fee is not to be taxed as costs under Sec. 3212, Rev. St. 1913, as amended by laws of 1919, c. 103, Sec. 2, which applies only to an action at law or an insurance policy against an insurance company."[58]

§ 575. **Interest.**—The employee is entitled to the statutory rate of interest on compensation payments from the time they become due and payable.

In an Illinois case the court said: "Defendant in error is legally entitled to interest at the rate of 5 per cent per annum on the award, and each past-due installment thereof, from the time the same become due and payable under the provisions of the award. Section 3 of our statute on interest provides:—

'When judgment is entered upon any award, report or verdict, interest shall be computed at the rate aforesaid, from the time when made or rendered to the time of rendering judgment upon the same, and made a part of the judgment.' Hurd's Stat. 1916, p. 1580."[59]

55. Southern Surety Co. v. Lucero, — Tex. Civ. App. —, (1920), 218 S. W. 68, 5 W. C. L. J. 608.

56. Semmen v. Butterick Pub. Co., 166 N. Y. S. 993, B 1 W. C. L. J. 1247.

57. Southern Surety Co. v. Hendley, — Tex. Civ. App. —, (1920), 226 S. W. 454.

58. Abel Const. Co. v. Goodman, — Nebr. —, (1921), 181 N. W. 713.

59. McMurray v. Peabody Coal Co., — Ill. —, 118 N. E. 29, 1 W. C. L. J. 324; Chicago Interurban Traction Co. v. Indus. Bd., — Ill. —, 118 N. E. 464, 1 W. C. L. J. 518; U. S. F. & G. Ins. Co. v. Parsons, — Tex. Civ. App. —, (1920), 226 S. W. 418.

Where the employer had notice, it was equivalent to notice to the insurer and interest was properly allowed against the insurer on the amount allowed for medical and surgical attention and for the weekly payments from the date each item was due under the act.[60]

Construction of Statutes.

§ 576. **In General.**—The Workmen's Compensation Acts should be liberally construed so as to attain the accomplishment of their beneficent purposes,[61] but the court cannot create a liability where the law creates none.[62]

60. Home Life & Acc. Co. v. Orchard, — Tex. Civ. App. —, 227, S. W. 705.

61. Frank Martin-Laskin Co. v. Indus. Comm., — Wis. —, (1920), 179 N. W. 740, 7 W. C. L. J. 169; Bidwell Coal Co. v. Davidson, — Iowa —, 174 N. W. 592, 5 W. C. L. J. 71; Ogden City v. Industrial Comm., — Utah —, 193 Pac. 856; American Smelting & Refining Co. v. Cassil, — Neb. —, (1920), 175 N. W. 1021, 5 W. C. L. J. 552; Martel v. White Mills, — N. H. —, (1920), 111 Atl. 237, 6 W. C. L. J. 547; Illinois Indemnity Exchange v. Indus. Comm., — Ill. —, 124 N. E. 665, 5 W. C. L. J 42; Barber v. Jones Shoe Co., — N. H. —, 108 Atl. 690, 5 W. C. L. J. 560; In re Stewart, — Ind. App. —, (1920), 126 N. E. 42, 5 W. C. L. J. 514; Donahue v. Thorndike & Hix, — Me. —, (1920), 109 Atl. 187, 5 W. C. L. J. 855; Pierce v. Bekins Van and Storage Co., — Ia. —, 172 N. W. 191, 4 W. C. L. J. 78; American Indem. Co. v. Dinkins, — Tex. Civ. App. —, 211 S. W. 949, 4 W. C. L. J. 294; Bowman v. Indus. Comm., — Ill. —, 124 N. E. 373, 4 W. C. L. J. 701; Karoly v. Indus. Comm., — Colo. —, 176 Pac. 284, 3 W. C. L. J. 98; Taglinette v. Sidney Worsted Co., — R. I. —, 105 Atl. 641, 3 W. C. L. 662; Bates and Rogers Const. Co. v. Allen, — Ky. App. —, 210 S. W. 467, 3 W. C. L. J. 719; Holt Lbr. Co. v. Indus. Comm., — Wis. —, 170 N. W. 366, 3 W. C. L. J. 549; Rish v. Iowa Portland Cement Co., — Iowa —, 170 N. W. 532, 3 W. C. L. J. 463; Indus. Comm. v. Johnson, — Colo. —, 172 Pac. 422, 2 W. C. L. J. 3; Phil Hollenbach Co. v. Hollenbach, — Ky. App. —, 204 S. W. 152, 2 W. C. L. J. 492; Mitchell v. Phillips Mining Co., — Ia. —, 165 N. W. 108, 1 W. C. L. J. 191; Scott's Case, — Me. —, 104 Atl. 794, 3 W. C. L. J. 49; In re Simmons, — Me. —, 103 Atl. 68, 1 W. C. L. J. 984; Bernabeo v. Kaulback, 226 Mass. 128, 115 N. E. 279, A 1 W. C. L. J. 773; In re Kelley, — Ind. App. —, 116 N. E. 306, A 1 W. C. L. J. 487; Holland-St. Louis Sugar Co. v. Shraluka, — Ind. App. —, 116 N. E. 330, A 1 W.

The New Hampshire Employer's liability act like the compensation acts of the various states, is a remedial act and is to be liberally construed.[63]

The intention of the legislature is to be gathered from the necessity or reason of the act and the meaning of words is to be derived from consideration of the whole act,[64] and doubts respecting the rights to compensation should be resolved in favor of the employee or his dependents.[65] The title must be considered when construing the Main act, in view of Const. Art. 3, § 3.[66]

"That statutes should receive a broad and liberal construction, there can be no doubt. Young v. Duncan, 218 Mass. 346, 106 N.

C. L. J. 534; Mayor, etc. of Jersey City v. Borst, — N. J. —, 101 Atl. 1033, B 1 W. C. L. J. 1161; Brienen v. Wis. Pub. Serv. Co., 166 Wis. 24, 163 N. W. 182, B 1 W. C. L. J. 1664; Armour v. Indus. Bd., 197 Ill. App. 363, Jdg. Affd. 275 Ill. 328, 114 N. E. 173; Kiel v. Indus. Comm., 163 Wis. 441, 158 N. W. 68; Ruda v. Indus. Comm., 283 Ill. 550, 119 N. E. 579, 2 W. C. L. J. 220; Juergens v. Indus. Comm., 290 Ill. 420; Lumbermen's Reciprocal Ass'n. v. Behnken, — Tex. Civ. App. —, (1920), 226 S. W. 154, 7 W. C. L. J. 363; Hendley v. Okla. Union Ry. Co., — Okla. —, (1921), 197 Pac. 488; Johnson Coffee Co v. MacDonald, — Tenn. —, (1920), 226 S. W. 215; Starnos v. Indus. Comm., — Okla. —, (1921), 195 Pac. 762; Indus. Comm. v. Weigant, — Ohio, —, (1921), 130 N. E. 38; Town of Stephenson v. Indus. Comm., — Wis. —, (1921), 180 N. W. 842.

62. Morris & Co. v. Indus. Comm., — Ill. —, (1920), 128 N. E. 727, 7 W. C. L. J. 4; Elks v. Conn., — Iowa —, 172 N. W. 173, 4 W. C. L. J. 72.

63. Manchester Street Ry. v. Barrett U. S. Circuit Ct. of App., (1920), 265 Fed. 557, 6 W. C. L. J. 421; Lizotte v. Nashua Mfg. Co., 78 N. H. 354, 100 Atl. 757; Morin v. Nashua Mfg. Co., 78 N. H. 567, 103 Atl. 312; Boody v. K. & C. Mfg. Co., 77 N. H. 208, 90 Atl. 859, L. R. A. 1916A, 10 Ann. Cas. 1914D, 1280.

64. Oriental Laundry Co. v. Indus. Comm., Ill. — (1920), Ind. App. —, 117 N. E. 658, 1 W. C. L. J. 171; Klippert v. Indus. Comm., — Wash. —, (1921), 196 Pac. 17; Eastern Texas Elect. Co. v. Woods, (Tex), (1921), 230 S. W. 498.

65. Ogden City v. Indus. Comm., — Utah —, (1920), 193 Pac. 857, 7 W. C. L. J. 249; Brown v. Bristol Last Block Co., — Vt. —, (1920), 108 Atl. 922, 5 W. C. L. J. 628; Wick v. Gunn, — Okla. —, 169 Pac. 1087, 1 W. C. L. J. 716; In re Loper, — Ind. App. —, 116 N. E. 324, A 1 W. C. L. J. 564; Petraska v. National Acme Co., — Vt. —, (1921), 113 Atl. 536.

66. Matis v. Schaeffer, — Pa. —, (1921), 113 Atl. 64.

E. 1; In re Petrie, 215 N. Y. 335, 109 N. E. 549; City of Milwaukee v. Miller, 154 Wis. 652, 144 N. W. 188, L. R. A. 1916 A, 1, Ann. Cas. 1915B, 847; Foth v. Macomber & Whyte Roper Co., 161 Wis. 549, 154 N. W. 369; and Phil Hollenbach Co. v. Hollenbach, 181 Ky. 262, 204 S. W. 152. But, howsoever worthy the end to be accomplished, courts cannot amend statutes under their power to liberally construe them. Such power of amendment is possessed only by the Legislature, and to that authority the salutary reasoning of the court, and the like argument of the counsel in this case, might be appropriately addressed.

"The term "construction" necessarily presupposes some doubt, obscurity, or ambiguity, and where these elements or any of them exist to such an extent as to afford grounds for different constructions, under the rule, supra, that one will be adopted which will effectuate the purpose of the Legislature in the enactment of the statute. But where the wording of the statute is plain, and susceptible of but one meaning, there is no room for construction, and the meaning expressed by the words employed must be adopted, although such adoption might result in a failure to accomplish the full purpose the legislature had in view in enacting it.

"Hence, in the case of Western & Southern Life Insurance v. Weber, 133 Ky. 32, 209 S. W. 716, where this court had under consideration the construction of section 679 of our present statutes, it was said in the course of the opinion, quoting from Robertson v. Robertson, 100 Ky. 696, 39 S. W. 244:

'When a statute is plain and peremptory there is nothing for the court to do but to enforce it as it is written."

"Again quoting from Sutherland on Statutory Construction, Par. 366, it is therein said:

"Even when the court is convinced that the Legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of language which is free from ambiguity.'

"Still further along in that opinion this language is used:

'The judiciary is but one of the three component parts of our form of government. Its duty is to interpret and construe laws,

not to enact them, and if a plainly warranted construction of a statute should result in a failure to accomplish in the fullest measure that which the Legislature had in view, the remedy is legislative action and not judicial construction.' "[67]

"The Workmen's Compensation Act sought the correction of recognized errors and abuses by introducing new regulations for the advancement of the public welfare. Being remedial in character, it should be construed with regard to former laws and the defects or evils to be corrected and the remedy provided. It should be liberally construed to the end that the purpose of the Legislature, by suppressing the mischiefs and advancing the remedy, be promoted, even to the inclusion of cases within the reason although outside the letter of the statute. 36 Cyc. 1175."[68]

In giving a liberal construction to the Workmen's Compensation Act it should not be extended to cases which cannot reasonably be interpreted as within its scope.[69]

As the Workmen's Compensation law should receive the most liberal construction, findings and awards should not be reversed for failure to observe formal rules of evidence where the appellant has not been materially prejudiced.[70]

The word "regular," as used in the compensation act, excepting officials who have been elected or appointed for a regular term of office, or to complete the unexpired portion of any regular term, means conformable to law.[71]

67. Frey's Guardian v. Gamble Bros., — Ky. App. —, (1920), 221 S. W. 870. 6 W. C. L. J. 171; Page v. New York Realty Co., — Mont. —, (1921), 196 Pac. 871; Western Indem. Co. v. Milam, — Tex. Civ. App. —, (1921), 230 S. W. 825.

68. In re Duncan, —Ind. App.—, (1920), 127 N. E. 289, 6 W. C. L. J. 148.

69 Pimental's Case, — Mass. —, (1920), 127 N. E. 424,, 6 W. C. L. J. 185; Moran's Case, — Mass. —, 125 N. E. 157, 5 W. C. L. J. 249; Lizotte v. Nashua Mfg. Co., — N. H. —, 100 Atl. 757, B 1 W. C. L. J. 1125.

70. Day v. Sioux Falls Fruit Co., — S. Dak. —, (1920), 177 N. W. 816, 6 W. C. L. J. 216.

71. Rooney v. City of Omaha, — Neb. —, (1920), 177 N. W. 166, 6 W. C. L. J. 69.

It was held in a New York case that the doctrine that the relation of employer and employee does not exist unless the employment is a "legal" one, violates the spirit of the statute and reads into it a provision not intended by the legislature.[72] On this question there is however, considerable conflict of authority as will be seen by reference to Section 14,—Election of Act by Minors.

In all cases the court must be guided by the clear intendment of the act as expressed by the words and definitions there used.[73]

The amendment of 1919, to the Utah Act, providing for review on certiorari in the Supreme Court in the first instance instead of in the district court, was held not to affect cases pending and being prosecuted prior to the time the amendment became effective.[74]

The compensation act should be construed as it was at the time of the injury and a subsequent amendment cannot be treated as a legislative construction of the act as it stood before the amendment.[75]

Compensation awarded under the compensation act is not damages, but is compensation which simply means salary or wages.[76]

An amendment defining dependency is not merely a rule of evidence and therefore it has no retroactive effect.[77]

72. Boyle v. A. C. Cheney Piano Action Co., — N. Y. —, (1920), 181 N. Y. S. 668, 6 W. C. L. J. 95.

73. Blake v. Wilson, — Pa. —, 112 Atl. 126; Qualp v. James Stewart Co., — Pa. —, (1920), 109 Atl. 780, 6 W. C. L. J. 99; City of Shreveport v. Southwestern Gas & Elect. Co., 74 So. 659, A 1 W. C. L. J. 695.

74. Indus. Comm. v. Agee, — Utah —, (1920), 189 Pac. 414, 6 W. C. L. J. 114.

75. Jennings v. Mason City Sewer Pipe Co., — Iowa —, 174 N. W. 785, 5 W. C. L. J. 233; Southern Surety Co. v. Lucero, — Tex. Civ. App. —, (1920), 218 S. W. 68, 5 W. C. L. J. 608.

76. Woodcock v. Board of Education of Salt Lake City, — Utah —, (1920), 187 Pac. 181, 5 W. C. L. J. 620.

77. Collwell v. Bedford Stone and Const. Co., — Ind. App. —, (1920), 126 N. E. 439, 5 W. C. L. J. 823.

The words "by an accident arising out of the employment" should receive a liberal construction to accomplish the humane purposes of the act.[78]

"The Minnesota Workmen's Compensation act does not repeal by implication, Section 52, of the Charter of the City of St. Paul, providing compensation for a fireman injured in the course of his employment."[79]

Rights of the injured employees are measured by the act in force at the time of the injury.[80]

Rulings of English Courts are pursuasive in cases wherein the acts are materially similar.[81]

The Supreme Court must assume that words used in a statute were chosen with reference to their established legal meaning.[82]

It must be presumed that the legislature had in view the definition of wilful as found in the California penal code Sec. 7, which is a "purpose to do an act without necessarily intending to violate a law or injure another."[83]

The General Statutes of Kansas 1915 Pars. 8492-95 do not enlarge the defendant railroad's liability over that created by the Employer's Liability Act of April 22, 1908, ch. 149, 35 Stat. 65 (U. S. Comp. St. 1916, Secs. 8657-65.[84]

78. In re Bollman, — Ind. App. ——, (1920), 126 N. E. 639, 5 W. C. L. J. 831.

79. Markley v. City of St. Paul, — Minn. —, 172 N. W. 215, 4 W. C. L. J. 107.

80. Hyman Bros. Box and Label Co. v. Indus. Comm., — Cal. —, 181 Pac. 784, 4 W. C. L. J. 343; Morris v. Muldoon, 177 N. Y. S. 673, 4 W. C. L. J. 623.

81 Hartford Acc. & Indem. Co. v. Indus. Comm., — Cal. —, 183 Pac. 234, 4 W. C. L. J. 593.

82. Waldum v. Lake Superior Terminal and Transfer Ry. Co., — Wis. —, 170 N. W. 729, 3 W. C. L. J. 671.

83. Bay Shore Laundry Co. v. Indus. Comm., — Cal. App. —, 172 Pac. 1128, 2 W. C. L. J. 207; Kackel v. Serviss, 167 N. Y. S. 348, 1 W. C. L. J. 235; Cooke v. Holland Furnace Co., — Mich. —, 166 N. W. 1013, 1 W. C. L. J. 994.

84. Rask v. Atchison, T. & S. F. Ry. Co., — Kan. —, 173 Pac. 1066, 2 W. C. L. J. 629.

The Louisiana Compensation Act limits the rights and remedies of employees and employers excluding other rights; "to prescribe" as used in the acts meaning to lay down authoritative as a guide or rule of action.[85]

The word "or" used in a statute relating to the dependency of parents does not restrict compensation to one parent if both have been supported.[86]

It has been held that the fact that the Washington Compensation Act, abolishes certain common-law defenses within the state, and also makes the statute applicable to minors legally employed, does not show an intention to limit the act to injuries occurring within the state; nor must the principles applicable to tort actions be applied in view of the fact that the act supersedes certain tort actions.[87]

The Louisiana Act Sec. 3, Par. 3 of Act 20, (1914), applies only to contracts of employment that have been in existence for a period longer than thirty days.[88]

"The Workmen's Compensation Act indeed should be liberally construed, yet contracts for personal service are not thereby abrogated nor is the employer thereby restricted from enlarging or diminishing his business, and from extending or limiting accordingly the field of employment. It may often happen that because of defects which must be remedied, or of necessary repairs, a portion of the works is "shut down," although the remainder continues in operation. If under such circumstances and with knowledge of them an employee solely for his own personal comfort, and in the exercise of his discretion, is injured while on the part the use of which has been shut off or forbidden it would be going far to

85. Philps v. Guy Drilling Co., — La. —, 79 So. 549, 2 W. C. L. J. 783; Martin v. Kennecott Copper Corp., 252 Fed. 207, 2 W. C. L. J. 867;

86. State Indus. Comm. v. McCormick, 167 N. Y. S. 564, 1 W. C. L. J. 436.

87. Anderson v. Miller Scrap Iron Co., — Wash. —, 170 N. W. 275, 3 W. C. L. J. 389.

88. Woodruff v. Producers Oil Co., — La. —, 76 So. 803, A 1 W. C. L. J. 729.

say, that he is entitled to compensation because the accident arose out of his employment."[89]

In construing the Michigan Act, the Supreme Court of that state said: "This statute is emphatically in derogation of the common law, to be construed and administered according to its terms and as it reads. The conclusion has been reached by this court in former cases that the schedule in section 10, part 2, of the act is plain and unambiguous; that it is not for the court or the Accident Board to change its provisions or to read into them palpable additions beyond the distinct limits of what they express. If the act is in certain features unfair, illogical, or incomplete, and should be changed, the remedy is with the Legislature. Limron v. Blair, 181 Mich. 76, 174 N. W. 546; Hirschkorn v. Fiege Desk Co., 184 Mich. 239, 150 N. W. 851; Weaver v. Maxwell Motor Co., 186 Mich. 588, 152 N. W. 993; Cline v. Studebaker Corporation, 189 Mich. 514, 155 N. W. 519, L. R. A. 1916C, 1139; Carpenter v. Det. Forging Co., 191 Mich. 45, 157 N. W. 374; Bruce v. Taylor & Maliskey, 192 Mich. 34. 158 N. W. 153; Purchase v. Grand Rapids Refrigerator Co., 160 N. W. 391; Packer v. Olds Motor Works et al., 162 N. W. 80, and Adomites v. Royal Furniture Co., 162 N. W. 965."[90]

Conflicts between an amended section and an unamended subsection should be construed in favor of the amended section.[91]

A statutory provision requiring certain payments in indemnity contracts refers only to cases where an injured employee elects compensation directly from the employer, and the provision barring certain agreements from such indemnity policies, refers only to cases where the employee elects to pursue his remedy in court.[92]

Punctuation may be disregarded in construing statutes.[93]

89. In re Borin, 227 Mass. 452, 116 N. E. 817, A 1 W. C. L. J. 790.

90. Wilcox v. Claridge Foundry, etc. Co., — Mich. —, 165 N. W. 925, 1 W. C. L. J. 627.

91. State v. District Court, 134 Minn. 131, 158 N. W. 798.

92. State ex rel. Turner v. Employers Liab. Assur. Corp., — Ohio —, 116 N. E. 513, B 1 W. C. L. J. 1473.

93. Schiller v. Baltimore & O. R. Co., — Md. App. —, (1920), 112 Atl. 272.

Statutes giving the right of appeal are to be liberally construed.[94]

"It is not for the court to say, where the language of a statute leads to a logical conclusion, that the literal meaning will not be followed, simply because by its wording it does not embrace cases which, as to the question of policy, seem for no good reason, to have been excluded."[95]

A statute prescribing a new right and a particular remedy must be strictly construed under the doctrine expressio unius est exclusio alterius.[96]

Where the provisions of the acts of other states had been construed with practical unanimity, the Legislature is presumed to have enacted the compensation act containing similiar provisions with the intention that it should receive the settled judicial construction given it by the other states, though the question had not been decided in the state from which the act was mainly taken.[97]

§ 577. **Retroactive Operation of Statutes.**—Amendments to the compensation acts which affect the procedure only, and in no way interfere with the substantial rights of the parties, are retroactive in their operation and apply to cases which arose prior to the amendment.[98]

But where the amendment affects the substantive rights of the parties it has no retroactive effect. Thus questions of dependency are to be determined by the law in force at the time of the accident and not by the law as subsequently amended.[99]

94. O'Boyle v. Parker Young Co., — Vt. —, (1921), 112 Atl. 385.

95. Ray v. School District of Lincoln, — Neb. —, (1920), 181 N. W. 140. Vietti v. Geo. K. Mackie Fuel Co., — Kan. —, (1921), 197 Pac. 881.

96. Page v. New York Realty Co., — Mont. —, (1921), 196 Pac. 871.

97. Steagall v. Sloss, — Sheffield Steel and Iron Co., — Ala. —, (1920), 87 So. 787.

98. Kuca v. Lehigh Valley Coal Co., — Pa. —, (1920), 110 Atl. 731, 6 W. C. L. J. 499; Rish v. Iowa Portland Cement Co., — Iowa —, 170 N. W. 532, 3 W. C. L. J. 463; People v. McGoorty, 270 Ill. 610, 10 N. C. C. A. 978; State ex rel. Maryland Cas. Co. v. Dist. Ct., — Minn. —, 158 N. W. 798, 13 N. C. C. A. 263; Devine's Case, — Mass. —, (1921), 129 N. E. 414; Gauthier v. Penobscot Chemical Fiber Co., — Me. —, (1921), 113 Atl. 28.

99. Hanson v. Flinn-O'Rourke Co., Inc. — App. Div. —, (1920). 183 N. Y. S. 213, 6 W. C. L. J. 476; Collwell v. Bedford Stone &

The statute allowing compensation for facial disfigurement is not retroactive.[1]

An act of Congress of Oct. 6, 1917, saving to claimants, entitled to compensation for injuries received in maritime or interstate commerce employment, their rights and remedies under the workmen's compensation law, whenever that law was competent to give a remedy, cannot be construed as having a retroactive effect. This act as previously noted has been declared unconstitutional.[2]

Where the Washington Act, was so amended as to allow a claimant $20.00 per month additional for an attendant where he was rendered totally unable to care for himself as a result of his injuries, it was held that, in a case arising prior to the amendment, the additional compensation could be granted from and after the date the amendment went into effect and that this did not give the amendment a retroactive effect contrary to the intention of the legislature.[3]

The Iowa and Ohio Courts have held that the act does not affect contracts entered into prior to its enactment.[4]

Under the Illinois Act, employees who entered upon their contract of employment prior to the passing of the workmen's com-

Const. Co., — Ind. App. —, (1920), 126 N. E. 439, 5 W. C. L. J. 823; Boyer v. Crescent Paper Box Factory, — La. —, 78 So. 596, 2 W. C. L. J. 71; Smith v. Baking Co., 90 Conn. 217, 96 Atl. 963; Moran v. Rodgers & Haggerty, 168 N. Y. S. 410, 16 N. C. C. A. 188.

1. Craver v. Gillespie, — La. —, (1920), 86 So. 730, 7 W. C. L. J. 300.

2. Hogan v. United Fruit Co., — Pa. —, (1920), 109 Atl. 668, 5 W. C. L. J. 894; O'Brien v. Det, Forende Damphibs Selskab, (1920), — N. J. App. —, 109 Atl. 517, 5 W. C. L. J. 867; Thornton v. Grand Trunk-Milwaukee Car Ferry Co., — Mich. —, 168 N. W. 410, 2 W. C. L. J. 658; Peters v. Veasey, — U. S. —, 40 Sup. Ct. 65, 6 W. C. L. J. 27.

3. Talbot v. Indus. Ins. Comm., — Wash. —, 183 Pac. 84, 4 W. C. L. J. 661.

4. Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 636, 886; State v. Creamer, 85 Ohio St. 349, 97 N. E. 602, 1 N. C. C. A. 30.

pensation act, nevertheless are held to be subject to the act from the date it became effective.[5]

The Minnesota Workmen's Compensation Act "applies to the relation of employer and employee existing at the time of and which continued after its passage; and does not impair the obligations of the contract by which the relation came into existence."[6]

Accidents occurring prior to the enactment of the Federal Act are not compensable.[7]

A statute providing for a 15 per cent. reduction of compensation in cases where the employee wilfully failed to obey a rule has no application to cases wherein the accident occurred before the statute was in force.[8]

An amendment of the Minnesota Act, providing that an action for compensation must be begun within one year after the accident was held not to be retroactive.[9]

An amendatory provision, that a failure to give notice will not bar a claim where it does not prejudice the insurer, has no retroactive effect;[10] nor has an amendment abolishing the necessity of making a claim within six months, a retroactive effect.[11]

5. Drtina v. Charles Tea Co., — Ill. —, 118 N. E. 69, 1 W. C. L. J. 320.

6. State ex rel. v. District Court Meeker Co., 128 Minn. 221, 11 N. C. C. A. 636.

7. In re Albert F. Meukow, 2nd A. R. U. S. C. C. 222; In re James L. Colman, 2nd A. R. U. S C. C. 223; Arizona & N. M. Ry. Co. v. Clark, 207 Fed. 817, 11 N. C. C. A. 630; see also, State ex rel. Nelson v. District Court of Meeker County, 128 Minn. 221, 15 N. C. C. A. 681; Baur v. Court of Common Pleas, 88 N. J. Law, 128, 11 N. C. C. A. 634, 14 Ibid, 353; Birmingham v. Lehigh & Western Coal Co., (N. J.), 95 Atl. 242, 11 N. C. C. A. 630; Sexton v. Newark District Telegraph Co., 84 N. J. Law 85, 11 N. C. C. A. 633.

8. Frint Motor Car Co. v. Indus. Comm., — Wis. —, 170 N. W. 285, 3 W. C. L. J. 399.

9. State ex rel. Anderson v. Gen. Acc. Fire & Life Assur. Corp., — Minn. —, 158 N. W. 715; Franchino v. C. M. Grey Mfg. Co., 37 N. J. L. J. 203; Newbaker v. N. Y. S. & W. R. R. C., 38 N. J. L. J. 175.

10. Walkden's Case, — Mass. —, (1921), 129 N. E. 396.

11. Cuna v. Elton Lbr. Co., — La. —, (1921), 88 So. 493.

The amendment of the New Jersey Act, P. L. 1913, page 307, concerning consecutive payments for partial and permanent disability, does not apply to accidents which happened before the amendment became effective.[12]

It has been held that Laws of Connecticut 1919, ch. 142, §6, which materially changed the method of determining the compensation of partial dependents did not apply to compensation for the death of one injured before, but dying after it went into effect, as the right to compensation arises from the contract of employment, of which the statute in force at the time of the injury forms a part, especially in view of the provision of the General Statutes 5350 which provides that, "questions of dependency shall be determined in accordance with the fact as the fact may be at the time of the injury."[13]

Under the Indiana Act the rights of parties are to be fixed in accordance with the laws as they existed at the time of the accident, therefore an amendment to the act providing that remarriage of a widow would terminate her dependency but not that of the child, would not affect the status of the child, since the law of the state at the time of the accident to the father provided that remarriage of the mother would terminate the dependency of herself and her child, and it was proper to terminate the award to the child upon the mother's remarriage.[14]

§ 578. **Referendum.**—The Oregon Act was passed February 25, 1913, being chapter 112 of the laws of 1913. It contained a provision that it should take effect on the 30th day of June next following the passage of the Act. Under a provision of the Constitution of Oregon providing for a referendum vote by the people; a referendum petition was filed and under the Constitution, Under such circumstances, an Act does not take effect until "it

12. Baur v. Court of Common Pleas Essex County, — N. J. L. —, 95 Atl. 625, 11 N. C. C A. 634.

13. Quilty v. Connecticut Co., — Conn. —, 113 Atl. 149 (1921); Shink v. Augustus Carey Co., — Me. —, 113 Atl. 32, (1921); Gray v. St. Croix Paper Co. et al., — Me. —, 113 Atl. 32 (1921).

14. Riggs v. Lehigh Portland Cement Co. — Ind. App. —, (1921), 131 N. E. 231.

is approved by a majority of the votes cast thereon." The election approving the Act was held Nov. 4, 1913. As the Act provided on its face that it should not apply to injuries occurring before the 30th day of June after the Act took effect, it was held that it applied only to injuries which occurred after June 30, 1914.[15]

The referendum provision of the constitution of Oregon has been incorporated in the constitution of Missouri, Article 4, section 57. Under its provisions a referendum petition was filed with the Secretary of State of Missouri requesting that the Missouri Workmen's Compensation Act of 1919 be submited to a referendum vote of the people at the next general election. As in Oregon under such circumstances the act does not take effect until it is approved by a majority of the votes cast thereon.

Suit was filed to enjoin the secretary of state from accepting and filing the petition on the ground that the act contained an emergency clause reciting that, "it being necessary for the commission therein created to be fully organized to make preliminary preparations, and there being immediate necessity therefor, an emergency is created within the meaning of the constitution, and, except as therein otherwise provided, said act shall take effect from and after the day of its approval," and that under section 57 of article 4 of the Constitution of Missouri the referendum of said act could not be ordered in that, in fact and by reason of the industrial unrest and industrial conditions and remedies thereof, and as declared by the General Assembly, said law was and is necessary for the immediate preservation of the public peace, health, and safety.

It was also contended that the petition was not legally sufficient because many of the signers did not understand the act, because many of the signers had by means of post card requests to the secretary of state sought to withdraw their signatures from the petition (it being required that the petition contain the signatures of five percent of the legal voters of two thirds of the congressional districts of the State), because many of the

15. Salem Hospital v. Olcott, 67 Oreg. 448, 136 Pac. 341, 4 N. C. C. A. 614.

signers were not registered voters and therefore not legal voters.

It was held that the compensation act did not come within the Constitutional exception of nonreferable laws to which immediate effect may or may not be given by an emergency clause, because the emergency clause contained in the compensation act did not pretend to bring the act within the exception of the amendment of section 1 of article 4 of the constitution being laws "necessary for the immediate preservation of the public peace, health, or safety."

It was further held that where there was no fraud, a voter who did not read the referendum petition cannot question his signature because he did not understand the act or nature of the petition; that signatures could not be withdrawn by unverified post car request; that it was not necessary for a voter to be registered in order to be a legal voter.[16]

The injunction was denied and the act failed of receiving a majority vote at the election in November 1920.

The Missouri Compensation Act of 1919 was re-enacted, with some amendments, in 1921, but the proposed emergency clause which would have placed it in the non-referable class failed to carry and another referendum petition has been filed which again prevents the law from becoming effective unless and until it receives a majority vote at the next general election in November 1922.

579.—Rights under Federal Compensation Act and Federal Employers Liability Act.—"Appellant contends that the Ferderal Compensation Act of September 7, 1916 (U. S. Comp. St. Pars. 8932a-8932uu), governs the compensation payable by the federal government to the widow and children of the deceased employee. Section 1 of the act reads:

'The United States will pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty,' etc. Section 8932a U. S. Comp. St.

16. State ex rel. Westhus v. Sullivan, — Mo. —, 224 S. W. 327. See also State ex rel. Pollock v. Becker, — Mo. —, 233 S. W. 641.

Section 10 of the Government Control Act of March 21, 1918 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, Par. 3115-3/4j), provides:

'That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any act applicable to such federal control or with the order of the President. Actions of law and suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any such action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government.'

From the foregoing act, as well as from Order No. 50 of the Director General, it is clear that actions of this character and the measure of damages are governed by the laws in force prior to the time the federal government assumed control of the railroads. The Supreme Court of the United States has affirmed many judgments against the Director General of Railroads in actions of this character. This identical question was decided againt appellant's contention in Dahn v. McAdoo, Director General (D. C.) 256 Fed. 549. Syllabi 1 and 2 read:

'1. Under Act Aug. 29, 1916, authorizing President to take over transportation systems, President's proclamation of December 26, 1917, delegating control to Director General of Railroads, Federal Control Act, Par. 10 (Comp. St. 1918, Par. 3115-3/4j), and General Order No. 50 of Director General, a personal injury action commenced subsequent to General Order No. 50 on a cause of action occurring during federal operation may be maintained against Director General of Railroads.

2. The Federal Employees' Compensation Act (Comp. St. Pars. 8932a-8932uu) does not provide an exclusive remedy, so as to preclude a railway mail clerk from maintaining a personal injury negligence action against the Director General of Railroads.'' '[17]

17. Midwest Nat. Bank & Trust Co. v. Davis, — Mo. —, 233 S. W. 406.

APPENDIX

FORMS

Since the forms used by the Compensation Commissions and Boards of the various states are usually available to the practitioner upon request to their secretary, it was not considered advisable to encumber this work with the forms used in all the states. Instead the forms have been inserted that are used in California, Illinois, New York and Ohio, the compensation acts of which states are more or less typical of the different classes of compensation acts. The forms here included with the proper changes as to the venue will in most cases be found to be adequate.

Form No. 2. 42759 12-18 5M

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA
525 Market Street, San Francisco

No.----------

EMPLOYER'S UNLIMITED WRITTEN ACCEPTANCE

Of Compensation Provisions of

WORKMEN'S COMPENSATION, INSURANCE AND SAFETY ACT OF 1917

(Chapter 586, Laws 1917)

TO THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA:

Please take notice that the undersigned, an employer of labor in the State of California, hereby accepts the Compensation provisions of Chapter 586 of the Laws of 1917 of the State of California, known as the "Workmen's Compensation, Insurance and Safety Act of 1917," for those classes of employees which are not included within the term "employee" as defined by section eight (8) of said law, and not entitled to compensation under said law, unless election be made to come under the compensation provisions of this act in the manner required by section seventy (70) thereof.

If it is desired that the above acceptance exclude employees whose employment is both casual and not in the usual course of the trade, business, profession or occupation of the employer, that fact must be expressly mentioned on this line; merely state "Casual employees excluded."

Dated at ----------, Cal.,
this ---------- day of----------,191----.

This notice must be signed and dated by employer and filed with the Industrial Accident Commission before it becomes effective. If employer is a corporation, this notice must be signed by its proper officers thereunto duly authorized and the corporate seal affixed.

Signed ---------- (SEAL)

Street and No. ----------
City ----------

WORKMEN'S COMPENSATION LAW

The following is requested solely for the information of the Industrial Accident Commission:

Number of employees _____

Location of place of employment _____

Nature of employment _____

NOTE.—The filing of the foregoing acceptance subjects the employer to the compensation provisions of Chapter 586, Laws 1917, for the term of one year from the date of filing and thereafter, without further act on his part, for successive terms of one year each, unless such employer shall, at least sixty days prior to the expiration of such first or any succeeding year, file with the Industrial Accident Commission a written notice of the withdrawal of this acceptance. (Section 70, Chapter 586, Laws 1917.)

Form No. 34

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA
525 Market Street, San Francisco

INDUSTRIAL ACCIDENT COMMISSION
OF THE
STATE OF CALIFORNIA

NOTE—Under the provisions of the Workmen's Compensation, Insurance and Safety Acts, the applicant need only state the general nature of the claim in controversy. Full particulars should be given, but an application will not be held invalid by reason of any defect. This form is intended to assist the applicant and to suggest all necessary particulars. Either party may be represented in person, by attorney or other agent. When application has been filled out and signed by the applicant, the original, together with one copy for each party to the controversy, should be filed with or mailed to the INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, 525 Market Street, San Francisco.

This application must be filled out in every possible detail.

See chapter 176, Laws of 1913, chapters 541, 607 and 662, Laws of 1915, chapter 586, Laws of 1917, and chapter 471, Laws of 1919.

_____ _____ _____ _____ Applicant__, VS. _____ _____ _____ _____ Defendant__.	Claim No._____ **Application for Adjustment of Claim**

The petition of the above-named applicant__ respectfully shows to your Honorable Commission as follows:

I.

That on the _____ day of _____ 192__, _____ _____ was _____ by reason
Name of person injured Killed or injured
of an injury arising out of and in the course of h_____ employment by the above named _____
Name of Employer
That your petitioner is the _____
If applicant is a dependent, state relationship
person injured.

II.

That a question has arisen with respect to the compensation to be paid therefor and the general nature of the claim in controversy is as follows, to wit:

Give the date that employer refused to pay the compensation demanded, and state briefly the exact matter in dispute, as for example:
(A) Employer denies liability for compensation upon the grounds that: or
(B) A dispute has arisen concerning the amount or duration of the compensation payable.

.....
.....

III.

That the following is a statement of particulars relative to this application:

1. Name of injured employee. Address. Occupation. Age.	
2. Name of employer. Address. Place of business. Business address.	
3. Names and addresses of all other defendants and reasons why they are joined. Name and address of employer's insurance carrier, if known.	
4. Place of injury.	
5. Nature of work on which injured person was engaged at time of injury.	
6. How did injury occur? (Describe in detail.)	
7. Nature of physical injury. (Describe in detail.)	
8. Has injured person fully recovered? If so, when? When did injured person return to work?	
9. Particulars of disability, whether total or partial, and estimated duration thereof. If death resulted, so state, giving date of death.	

10.	Was medical and surgical treatment required? Was it furnished by employer? If not, did employer have opportunity to furnish it?	
11.	Names and addresses of attending physicians.	
12.	Wages of employee at time of injury. (State whether paid by day, week, month, or year.) How long did injured person work for this employer at this wage prior to the injury? State whether employment was for 5, 5½, 6, 6½ or 7 days per week.	 dollars per.....
13.	Amount injured person is now earning, or is now able to earn in some suitable employment or business (after the injury).	$.....per week; $..... per month.
14.	Payment, allowance or benefit received from employer.	$.....for medical care and attendance. $.....per week for.....weeks' disability compensation.
15.	Additional amount claimed as compensation.	$.....for medical care and attendance. (Itemize expenditures made by you for this purpose) $.....per week for.....weeks' disability.
16.	When and how was the employer notified of the injury?	
17.	If employer was not notified within thirty days after date of injury, give reason for failure to notify him.	
18.	If application is filed to adjust claim for death, state name, address and relationship of all dependents. If to adjust claim for medical attendance or funeral expenses, state name and address of all other such creditors and amount of claims, if known.	(In case of death of employee this paragraph must be filled out completely) Name Age Address Name Age Address Name Age Address Name Age Address

IV.

(Here state any further facts that may be desired)_____

WHEREFORE YOUR PETITIONER PRAYS, That the above-named defendant__ be required to answer this petition, that a time and place be fixed for hearing hereof and due notice thereof given, and that upon such hearing, an order or award be made by your Honorable Commission granting such relief as the said applicant__ may be entitled to in the premises.

Dated at _____ (Signed) _____
this_____day of_____192__ Address _____

BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

In the matter of _____ Injured employee. vs. _____, employer. and _____ Insurance Carrier.	STIPULATED STATEMENT OF FACTS WITH REQUEST FOR ENTRY OF FINDINGS AND AWARD OF THE COMMISSION THEREON.

The undersigned, _____, an injured employee, (dependents of _____, a deceased employee) and _____, employer (_____, insurance carrier of employer), desiring to submit to the Industrial Accident Commission the following agreed statement of facts, for entry of Findings and Award thereon, such award to be within the continuing jurisdiction of the Commission as in other cases, hereby respectfully submit to the Commission the following agreement:

1. That the said employee, _____, was injured on the _____ day of _____, 191__, while in the employment of the employer herein named, and that said injury occurred in the course of, arose out of the employment of the said employee and consisted in _____

_____.

2. That the average weekly wages of the employee at the time of his injury were _____, said wages being computed in accordance with the provisions of the Workmen's Compensation Act of 1917, upon the following facts as to the actual wages _____

_____.

3. The nature of the disability of said employee, caused by the said injury, is _____

(State nature of accident whether fatal or non-fatal, and if latter, Whether disability is total or partial, permanent or temporary, and the duration thereof.)

4. (If fatal injury, fill out this paragraph.) The death of said employee occurred on the _____ day of _____, 191_____. The dependents are _____

(Name of the widow and her age)

(Names, ages and sex of all the children)

(Names and relationship of the other dependents, if any; state whether the dependency of each is total or partial; if partial to what extent.)

The amount agreed upon as a death benefit and the person to whom it is to be payable _____

The state of health of the widow is _____

The experience of the widow with relation to her ability to earn her own livelihood is _____

(If any of the children are physically or mentally deficient in such degree as to interfere with their earning power, state extent of impairment of earning capacity.)

5. That a bona fide difference of opinion exists as to the application of the Workmen's Compensation, Insurance and Safety Act with respect to the question of _____

and that the following are the agreed facts material to the decision of such controverted issue: _____

6. (To be used in case no controversy exists.) That the amount heretofore paid (due and unpaid) to said _____ to and including the date of this agreement is $_____.

7. (To be used in case no controversy exists.) That the amount agreed upon by the parties to be paid to _____ in full satisfaction and release of his claim arising under the Workmen's Compensation Act of California is as follows $_____.

8. (To be used in case no controversy exists.) That said sum is agreed to be paid in the following manner: _____

(If a commutation of future payments is desired instead of payments in weekly installments, here state reasons why a payment of the whole amount in a lump sum would be desirable and for the best interests of all parties.)

Respectfully Submitted,

_____ _____

_____ _____

Witnesses.

BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

CLAIM NO. _____

In the matter of the application of _____ _____ vs. _____ _____	STIPULATED STATEMENT OF FACTS WITH REQUEST FOR AWARD (Employer self-insured)

The undersigned, _____, (an injured employee) (dependents of _____, a deceased employee), and _____ employer, permitted by the Industrial Accident Commission to self-insure, desiring to submit to the Industrial Accident Commission, the following agreed statements of facts for entry of Findings and Award thereon, such award to be within the continuing jurisdiction of the Commission as in other cases, hereby respectfully submit to the Commission the following agreement:

1. That the said employee, _____, was injured on the _____ day of _____, 191__, while in the employment of said employer, and that said injury occurred in the course of, arose out of the employment of the said employee and occurred as follows:

(Give brief description of circumstances of injury) _____

2. (For non-fatal injuries) That the nature of the injury and disability of said employee, cause as above is _____

(State nature of injury, whether disability is total or partial, and duration or probable duration thereof. If permanent, state character of permanent condition. If physician's reports are available refer to them here and attach to this agreement.)

(To be filled out if disability is permanent.) That the disability sustained by said employee is permanent and that the Permanent Disability Rating Department of the Industrial Accident Commission has rated the percentage of such permanent disability at _____ per cent, which is agreed to be a correct determination.

3. (For fatal injuries) That the said employee died on the _____ day of _____, 191__, as a result of the said injury. That the dependents of said employee are _____

(Name of widow and her age)

(Names, ages and sex of all the children).

(Names and relationship of other dependents, if any. State whether the dependency of each is total or partial; if partial, the average annual amount devoted by deceased to the support of such partial dependent at the time of death.)

The state of health of each of the dependents is _____. The experience of each of the dependents with relation to their ability to earn their own living is _____.

(If any of the dependents are physically or mentally deficient in such a degree as to interfere with their earning power, state extent of impairment of earning capacity.)

.....

That the reasonable expense of the burial of the deceased employee was _____ dollars and that the employer herein may be directed by the Commission to make payment of said reasonable burial expense not to exceed one hundred dollars ($100.00) to _____

_____.

4. That the average weekly wage of the employee at the time of his injury was _____ dollars, such wages being computed in accordance with the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917, upon the following facts as to actual wages:

5. That the age of the employee at the time of his injury was_____ years and his occupation that of _____.

(To be filled out if disability is permanent; and employee is a minor.)

That the probable weekly wage which the injured employee would be able to earn in the same employment or in the usual course of promotion after attaining his majority, if he had not been injured, is _____ dollars.

6. It is further agreed that the filing of this agreement with the Commission is not barred by the period of limitations provided by the Compensation Act; that the employment of the employee was such as to bring him within the compensation provisions of such Act and the jurisdiction of this Commission; that the injury was not due to wilful misconduct or intoxication of the employee and was not self-inflicted; that the employer had knowledge or notice of the sustaining of said injury as provided by law.

7. That the employer has furnished such medical, surgical and hospital treatment as was reasonably required to cure and relieve said employee from the effects of said injury.

(If artificial member has been furnished, so state.)

(If employer has not furnished treatment as above indicated.)

That the reasonable value of medical expense incurred by or on behalf of the injured employee may be determined by the filing of itemized bills therefor with the Industrial Accident Commission and the approval of such bills, or the determination of the reasonable value of the services rendered, by the Medical Department of the Industrial Accident Commission. (If bills for such services are now available attach to this agreement.)

8. That the amount heretofore paid to said _____ _____, to and including the date of this agreement is _____ dollars which has been paid upon the following account: _____

(State whether for disability indemnity, death benefit, medical expense or burial expense.)

9. That the amount to be paid because of the injury herein set forth may be determined on this stipulation and ordered paid to the parties to whom due or to the State Compensation Insurance Fund, for their benefit, as decided by the Industrial Accident Commission under the provisions of the compensation law.

10. (To be used in case a dispute exists as to any matters affecting the liability of the employer.) That a bona fide difference of opinion exists as to the application of the Workman's Compensation Act upon the situation here presented, with reference to the question of_____

and that the following are the agreed facts with reference to such controverted issue: _____

Respectfully submitted,

_____ _____

_____ _____

BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

In the matter of injured employee _____ vs. _____, employer and _____ insurance carrier	STIPULATION and AGREEMENT

Come now the above named and undersigned parties hereto and agree and stipulate as follows:

1. That _____ was (or were) the employer of _____ on the _____ day of _____, 191__.

2. That both employer and employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Act, and to the jurisdiction of this Commission.

3. That _____ was (or were) insured against liability for compensation to injured employees in the _____ Insurance Company.

4. That on the _____day of _____, 191__, _____, while working for _____ suffered an accident by _____

5. That said accident arose out of and happened in the course of his employment, while he was performing duty incidental to said employment, and that said accident was not caused by the wilful misconduct or intoxication of said employee.

6. That necessary medical, surgical and hospital treatment during the ninety-day period thereafter was furnished and paid for by the employer (or insurance company).

7. That _____ (married with _____ dependent children) was a _____ by trade (or occupation), _____ years of age, whose average weekly wage was $_____, and that 65 per cent thereof equals $_____.

8. That by reason of said injury _____ suffered the following permanent disability, i. e., _____

which the permanent Disability Rating Department of the Industrial

Accident Commission has rated at _____%, entitling said employee to indemnity for _____ weeks, at $_____ per week.

9. That _____ weeks' indemnity have been previously commuted.

10. That disability indemnity at $_____ per week has been paid to said _____ for _____ weeks, up to the _____ day of _____, 191__, leaving accrued and unpaid on the _____ day of _____, 191__, _____ weeks' indemnity, equivalent to the sum of $_____.

11. That there was not yet due and payable on the _____ day of _____, 191__, a balance of _____ weeks' indemnity, the present value of which is $_____.

12. That the total amount to be paid to said _____ equals the sum of $_____.

13. That _____ is desirous of securing the payment of said entire unpaid balance in one lump sum, said commutation being sought for the reason that _____

14. That _____, insurance carrier for said _____, hereby gives its consent to said settlement upon its approval by the Industrial Accident Commission.

Dated at _____, California, this _____ day of _____, 191__.

Injured Employee

Insurance Company

By _____

WITNESS:

BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

In the matter of _____ Injured employee vs. _____, employer and _____ Insurance Carrier.	AGREEMENT FOR COMMUTATION OF FUTURE PAYMENTS with REQUEST FOR APPROVAL

The undersigned, _____, an injured employee, (dependents of _____, a deceased employee) and _____ employer (_____, insurance carrier of employer), desiring that future payments of compensation due the said employee (dependents) be paid in a lump sum, commuted and discounted at the rate of 6 per cent per annum, as prescribed by law, hereby respectfully submit to the Commission the following agreement:

1. That the said employee, _____, was injured on the _____ day of _____, 1920, while in the employment of the employer herein named, and that said injury occured in the course of, arose out of the employment of the said employee and consisted in _____
_____.

2. That the average weekly wages of the employee at the time of his injury were _____, said wages being computed in accordance with the provisions of the Workmen's Compensation, Insurance and Safety Act of 1920, upon the following facts as to the actual wages.
_____.

3. The nature of the disability of said employee, caused by the said injury is _____
(State nature of accident, whether fatal or non-fatal, and if latter, whether disability is total or partial, permanent or temporary, and the duration thereof.)

4. (If fatal injury, fill out this paragraph.) The death of said employee occurred on the _____ day of _____, 1920. The dependents are _____
(Name of the widow and her age)

(Names ages and sex of all the children)

(Names and relationship of other dependents, if any; state whether the dependency of each is total or partial; if partial, to what extent.)

The amount agreed upon as a death benefit and the persons to whom it is to be payable are _____
_____.
The state of health of the widow is _____.
The experience of the widow with relation to her ability to earn her own livelihood is _____

_____.

(If any of the children are physically or mentally deficient in such degree as to interfere with their earning power, state extent of inpairment of earning capacity.)

5. That the amount heretofore paid (due and unpaid) to said _____ to and including the date of this agreement is $_____.

6. That the compensation due in the future to the said _____ _____, is agreed to be as follows:
_____.

7. That a commutation of future payments is desired instead of payments in weekly installments, for the reason that _____

_____.

(Here state reasons why a payment of the entire amount in a lump sum would be desirable and for the best interests of all parties.)

8. That the Industrial Accident Commission may enter its award upon the foregoing agreed statement of facts, upon the request of either party or upon its own motion at any time subject to the right of the Commission to set aside said statement of facts or to re-open said award at any time under its continuing jurisdiction.

Respectfully submitted,

Dated at San Francisco, California,
this _____ day of _____, 1920.

Witnesses

BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

In the matter of _____ Injured employee. vs. _____, employer and _____ Insurance Carrier.	AGREEMENT OF COMPROMISE AND RELEASE with REQUEST FOR APPROVAL

The undersigned, _____, an injured employee, (dependents of _____, a deceased employee) and _____, employer (_____, insurance carrier of employer), desiring to compromise and settle the liability which exists against the said employer in favor of said employee (dependents), and to obtain the approval of the Industrial Accident Commission upon said compromise, hereby respectfully submit to the Commission the following agreement:

1. That the said employee, _____, was injured on the _____ day of _____, 19__, while in the employment of the employer herein named, and that said injury occurred in the course of, arose out of the employment of the said employee and consisted in _____.

2. That the average weekly wages of the employee at the time of his injury were _____, said wages being computed in accordance with the provisions of the Workmen's Compensation Act of 1917, upon the following facts as to the actual wages _____.

3. The nature of the disability of said employee, caused by the said injury is _____

(State nature of disability and whether total or partial, permanent or temporary, and duration thereof.)

4. That the amount heretofore paid to said _____ to and including the date of this agreement is $_____.

5. That the parties are desirous of compromising said liability for less than the full amount to which the said employee or his dependents should be entitled if they should file application therefor and be completely successful, for the reason that a reasonable and substantial doubt exists as to the right of the said employee or his dependents to full

compensation, and the parties are desirous of avoiding the hazard of litigation, such doubt and the reason for desiring a compromise being as follows: _____

_____.

6. That the amount agreed upon by the parties to be paid to _____, in full satisfaction and release of his claim arising under the Workmen's Compensation, Insurance and Safety Act of California is as follows: _____.

7. That said sum is agreed to be paid in the following manner:

_____.

(If a commutation of future payments is desired instead of payments in weekly installments, here state reason why a payment of the whole amount in a lump sum would be desirable and for the best interests of all parties.)

8. (In case of death of the employee, fill in this form).

The death of said employee occurred on the _____ day of _____, 19____. The dependents are _____

(Name of the widow and her age)

(Names, ages and sex of all the children)

_____.

(Names and relationship of the other dependents, if any; state whether each of such dependents is total or partial; if partial, to what extent.)

The amount agreed upon as a death benefit and the person to whom it is to be payable are _____

The state of health of the widow is _____.

The experience of the widow with relation to her ability to earn her own livelihood is _____

_____.

(If any of the children are physically or mentally deficient in such degree as to interfere with their earning power, state extent of impairment of earning capacity.)

9. That upon the payment of said sum of $_____, subject to the approval of this agreement, by the Industrial Accident Commission the said employer shall be and is hereby released from all further liability under the Workmen's Compensation, Insurance and Safety Act of California which the said _____

_____ his heirs, executors, administrators or assigns may have had, now have or shall have

against said employer, _____, his heirs, successors, assigns, executors or administrators, for compensation or damages for personal injuries sustained (or death of _____, employee of said employer) by the accident or injury herein mentioned.

Wherefore the undersigned respectfully requests the approval of this compromise and release by the Industrial Accident Commission.

Witness the execution hereof this _____ day of _____, 19____.

_____ _____

_____ _____

Witnesses.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

PERMANENT DISABILITY RATING DEPARTMENT

Underwood Building, 525 Market Street, San Francisco.

Surgeon's Special Report——Eye

Name of patient_____ Address _____

Age _____ Occupation _____

Date of Accident_____ Employer _____

1. Original injury as you first observed it. _____

2. What was done in the way of treatment? _____

3. What operations have been performed, by whom, and with what results? _____

4. Has repair been delayed from any cause? If so, what? _____

5. Was there any previous disease or injury to the eyes? If so, what?

6. Is there evidence of luetic, gonorrheal, tubercular or other infection?

7. Maximum central visual acuity for distance.
Visual acuity uncorrected _____O. D. _____O. S._____
Visual acuity after correction _____O. D._____O. S._____
Is it clear or blurred? _____Degree of blurring, if any?_____

8. Maximum central visual acuity for near or working distance.
Visual acuity uncorrected _____O. D._____O. S._____
Visual acuity after correction _____O. D._____O. S._____
Is it clear or blurred? _____Degree of blurring, if any?_____

9. Impairment of field vision and degree, if present. (To be measured by hand motions) _____

10. Hemiansposia, character if present? _____

11. Impairment of binocular vision and degree. _____

12. Impairment of stereoscopic vision and degree. _____

13. Photophobia and dazzling if any, and degree. _____

14. Lacrimation, if any, and degree. _____

15. Impairment of muscular balance, if present, and degree. _____

16. Ocular fatigue, vertigo, headache or other symptoms of eye strain, if present _____Are they permanent? _____

17. Glasses—Are they practicable for patient's occupation? _____
Do they cause dazzling? _____

18. Was the injured eye the master eye? _____

19. Remarks. (Cosmetic disfigurement etc.) _____
Signature of surgeon _____M. D
Date _____ Address _____ California

Form No. 9. 48706 9-19 5M

WORKMEN'S COMPENSATION LAW

INDUSTRIAL ACCIDENT COMMISSION
OF THE
STATE OF CALIFORNIA

PERMANENT DISABILITY RATING DEPARTMENT

Underwood Building, 525 Market Street, San Francisco

SURGEON'S SPECIAL REPORT—UPPER EXTREMITIES

THIS BLANK TO BE FILED ONLY WHEN MAXIMUM RESTORATION OF FUNCTION HAS BEEN ATTAINED

NOTICE
This original report must be sent by the examining surgeon, direct to the Industrial Accident Commission of the State of California and not to any other party.

Do NOT write in here
No.

Name of patient ---------- Address----------
Age ---------- Occupation ----------
Date of accident ---------- Hour ------M. Place of accident----------

1. Give description of injury, stating the condition of the patient when first called to your attention ----------

2. Give description of treatment employed in this case in full, stating what operations have been performed and with what results ----------

3. Name and address of surgeon who operated and assisted.
Surgeon ----------
Assistant ----------

4. Has repair been delayed from any cause? ----------
If so, what? ----------

5. Was there any previous permanent disability or deformity?_____
If so, what? _____

6. Is there evidence of luetic, gonorrheal or tubercular infection, or alcoholism? _____ If so, what? _____

7. Temperament of patient, any evidence of hysteria, neurasthenia, or hypochondria? _____ If so, what? _____

8. What is the PERMANENT DISABILITY in this case, if any? MARK ON CHART ON REVERSE SIDE EXACT LOCATION OF SAME. Discuss fully from the following standpoints:

a. AMPUTATION _____

b. DEFORMITY _____

c. ANKYLOSIS _____

d. ANÆSTHESIA or PARESTHESIA _____

e. LOSS OF FUNCTION. (As where flexer or extensor tendons have been destroyed or have been involved in callous or scar.) _____

NOTE—This must include each separate instance of loss of function due to this injury. Record as far as possible the degree of LOSS of function in each impairment, using a fraction with denomination representing the normal function. Example: Finger—index, major, proximal joint; normal function is 90/90. If loss of flection amounts to 60°, the notation should be 60/90 loss. Estimates will be made on VOLUNTARY, NOT PASSIVE motion.

Signed this _____ day of _____ 19__

_____ Street and No._____ City or Town_____

Surgeon executing blank sign here.

IS PATIENT RIGHT OR LEFT HANDED? _____

ADDITIONAL REMARKS:

Form No. 10. 3632 5-20 2M.

INDUSTRIAL ACCIDENT COMMISSION
OF THE
STATE OF CALIFORNIA

PERMANENT DISABILITY RATING DEPARTMENT

UNDERWOOD BUILDING, 525 MARKET STREET, SAN FRANCISCO
SURGEON'S SPECIAL REPORT—LOWER EXTREMITIES

THIS BLANK TO BE FILED ONLY WHEN MAXIMUM RESTORATION OF FUNCTION HAS BEEN ATTAINED.

NOTICE
This original report must be sent by the examing surgeon, direct to the Industrial Accident Commission of the State of California and not to any other party.

Do NOT write here.

No.

Name of patient _____ Address _____

Age _____ Occupation _____

Date of accident _____ Place of accident _____

1. Give description of injury, stating the condition of the patient when first called to your attention _____

2. Give description of treatment employed in this case in full, stating what operations have been performed and with what results _____

3. Name and address of surgeon who operated and assisted.
Surgeon _____
Assistant _____

4. Has repair been delayed from any cause? _____ If so what?__

5. Was there any previous permanent disability or deformity?_____
If so, what? _____

6. Is there evidence of luetic, gonorrheal or tubercular infection, or alcoholism? _____ If so, what? _____

7. Temperament of patient, any evidence of hysteria, neurasthenia, or hypochondria? _____ If so, what? _____

8. What is the PERMANENT DISABILITY in this case, if any? MARK ON CHART ON REVERSE SIDE EXACT LOCATION OF SAME. Discuss fully from the following standpoint—

a. AMPUTATION _____

b. DEFORMITY _____

c. ANKYLOSIS _____

d. ANÆTHESIA or UARESTHESIA _____

e. LOSS OF FUNCTION _____

NOTE—This must include each separate instance of loss of function due to this injury. Record as far as possible the degree of LOSS of function in each impairment, using a fraction with denominator representing the normal function. Example: Finger—index, major, proximal joint; normal function 90/90. If loss of flection amounts to 60°, the notation should be 60/90 loss. Estimates will be made on VOLUNTARY, NOT PASSIVE motion.

Signed this _____ day of _____19__

_____ Street and No. _____ City or Town_____

Surgeon executing blank sign here.

ADDITIONAL REMARKS:

Form No. 7

Employee's Request For Permanent Disability Rating.

INDUSTRIAL ACCIDENT COMMISSION
OF THE
STATE OF CALIFORNIA

Permanent Disability Rating Department

525 Market Street, San Francisco

No
RECEIVED

IMPORTANT—This is not an application for adjustment of claim and its filing with the Commission will not prevent the operation of the Statute of Limitations (6 months).

EMPLOYEE'S NAME _____ EMPLOYER _____
Address _____
Nativity _____ Married?_____ Address _____
AGE (give date of birth) _____ Insurance Company _____
OCCUPATION _____
How long engaged in this occupation here and elsewhere? _____ On what date was last compensation paid? _____

Accident occurred _____, 192__
Cause _____

Nature of injury _____

Doctor _____
Have you returned to work? ____ Date____
Have you resumed your former duties?_____
Present daily wage? _____Any reduction?___
Working for same employer as when injured? _____
Have you ever received any other permanent injury? _____ Sign here _____
If so, when? _____
What was its nature? _____Date_____

EMPLOYER'S CERTIFICATE OF INJURED PERSON'S WAGE AT TIME OF ACCIDENT

Wage _____per { day / week / month } _____Number of days employed per week_____

EXCLUDING board, lodging or other advantages.

If board, lodging, fuel or other advantages were furnished in addition to the wage, give estimated market value thereof _____

If injured was working on a basis different from a time basis, give actual amounts earned in each of the twelve months immediately preceding injury:

January, 192__, $_____		July, 192__, $_____	
February, 192__, $_____		August, 192__, $_____	
March, 192__, $_____		September, 192__, $_____	
April, 192__, $_____		October, 192__, $_____	
May, 192__, $_____		November, 192__, $_____	
June, 192__, $_____		December, 192__, $_____	

Signed this _____ day of _____ 192__

Employer at Time of Injury Sign Here

KINDLY STATE ALL THE DETAILS OF YOUR WORK AND THE DIFFERENT WAYS IN WHICH YOUR INJURY WILL AFFECT YOU IN FOLLOWING THIS WORK.

(If Necessary Use a Separate Sheet of Paper.)

INSTRUCTIONS

This blank, when properly executed and filed with the Industrial Accident Commission, presents your request for a permanent disability rating. This rating must be approved by the Department for the Rating of Permanent Disabilities, and will represent the degree of physical impairment or the percentage of loss of earning power resulting from the injuries which you have sustained. A definite amount of compensation is due and payable for each permanent injury, depending upon the degree of loss of earning power. It is essential, therefore, that the formality of applying for an approval rating be taken as soon as the permanent results of an injury are determined. FILL IN ALL BLANKS. WRITE LEGIBLY. USE INK OR TYPEWRITER. IF YOU ARE UNABLE TO UNDERSTAND THE QUESTIONS ASKED, REFER THE BLANK TO SOMEONE WHO DOES. THE WAGE CERTIFICATE IS TO BE EXECUTED AND SIGNED BY THE EMPLOYER IN WHOSE EMPLOYMENT YOU WERE PERFORMING SERVICE AT THE TIME OF THE ACCIDENT WHICH DISABLED YOU.

454 12-19 6M

Form No. 8. 45924 519-2M

INDUSTRIAL ACCIDENT COMMISSION
OF THE
STATE OF CALIFORNIA

PERMANENT DISABILITY RATING DEPARTMENT
UNDERWOOD BUILDING, 525 MARKET STREET, SAN FRANCISCO

SURGEON'S SPECIAL REPORT—EYE
(Fill in all blanks with ink, using pen or typewriter)

NOTICE
This original report must be sent by the examining surgeon, direct to the Industrial Accident Commission of the state of California and not to any other party.

DO NOT WRITE HERE

NO.

Name of patient _____ | Address _____
Age _____ | Occupation _____
Date of accident _____Hour__M. | Place of accident _____

1. Original injury as you first observed it.

2. What was done in the way of treatment?

3. What operations have been performed and with what results?

4. Name and address of surgeon who operated and assistant.

5. Has repair been delayed from any cause? If so, what?

6. Was there any previous disease or injury to the eyes?

7. Is there evidence of luetic, gonorrheal, or tubercular infection or alcoholism; tobacco or drugs?

8. Vision uncorrected { O. D..... O. S..... } Vision after correction { O. D..... O. S..... }

9. Any occupational disease?

10. Time of temporary disability.

11. Give a summary of the case as you see it
Peculiar conditions and your findings.
Use charts on back for illustrations.

12. What is the permanent disability in this case?

Signature of Surgeon _____M. D.

Date _____ Address _____ California

NOTICE

Section 64 of the Compensation Act provides that any party dissatisfied with any final decision of the Industrial Accident Commission may apply for rehearing. Petition for rehearing must be upon one or more of the following grounds.

1. That the Commission acted without or in excess of its powers;
2. That the order, decision or award was procured by fraud;
3. That the evidence does not justify the findings of fact;
4. That the applicant has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing; (Facts of new evidence with names of witnesses must be given in detail in petition)
5. That the findings of fact do not support the order, decision or award.

Petition for rehearing MUST BE FILED in the office of the Industrial Accident Commission in San Francisco or Los Angeles WITHIN TWENTY DAYS AFTER SERVICE OF THE FINAL ORDER, DECISION OR AWARD.

PETITION MUST BE SWORN TO, using the following:

State of California }
} ss.
County of _____ }

_____, being duly sworn deposes and says that he has read the foregoing petition and knows the contents thereof and that they are true, except as to those matters stated therein upon information or belief, and as to such matters, that he believes them to be true.

(Signature) _____

Subscribed and sworn to before me
this _____ day of _____ 192____.
(Signature) _____
(Title of officer)

4739 7-20 2500

CALIFORNIA FEE SCHEDULE FOR PHYSICIANS AND SURGEONS

FOR SERVICES RENDERED UNDER THE WORKMEN'S COMPENSATION INSURANCE AND SAFETY ACT

Approved by the Industrial Accident Commission May 1, 1920

Effective June 1, 1920.

NOTE A

THESE FEES REPRESENT A MINIMUM!

FEES HIGHER THAN SCHEDULE WILL BE ALLOWED WHEN WARRANTED BY UNUSUAL DIFFICULTIES OR REQUIRING AN UNUSUAL AMOUNT OF TIME.

NOTE B

Unusual cases and procedures not specified will entitle the surgeon to a fee the same as that for specified procedures of approximately equal magnitude.

NOTE C

Bills must be itemized, showing date of each visit, dressing or operation, and the charge for the same. Charges higher than minimum must be itemized and amply justified by clear explanation.

NOTE D

The Industrial Accident Commission is fully aware of the difficulties and inequalities of an inelastic fee schedule for surgical service. The schedule here presented is designed for use in connection with medical services rendered an individual with an average earning capacity of $1,250 per annum. To this class belongs the average individual which the Workmen's Compensation, Insurance and Safety Act is intended to cure and relieve.

NOTE E

The restoration of function is considered more important than appearance. It is the duty of the surgeon to restore function.

NOTE F

X-ray examination is exacted in all cases of bone injury and doubtful bone injury.

NOTE G

A special physical examination and report on a special blank furnished for that purpose will be made when requested by employer, insurance carrier or Industrial Accident Commission. The surgeon should state in his first report of accident whether or not in his judgment a special examination is advisable.

It is suggested that a special examination may be required in selected cases as follows:

1. Persons over 60 years of age.
2. The infirm or those of poor physique.
3. Injuries to head or thorax or abdomen.
4. Serious injuries of any kind.
5. Injuries which may involve nerves.

Immediate examination for nerve integrity in parts beyond site of fracture, dislocation or other injury is necessary in order to detect such complication at earliest possible time.

N. B.—Approximately 50 per cent of all injuries involve the fingers only. Such cases will probably not require general physical examination. The surgeon will make a recommendation for a special examination when necessary in regard to these and other uncomplicated injuries. For this special examination a fee of $5 will be allowed.

First visit, including report and first examination, in injury not provided for below	$2 50
or, including report and special examination as provided in Note G	5 00
Surgical dressings (materials)	Specify costs
Mileage beyond city limits	75c day, $1 00 night, one way per mile.
Assisting at operation—	
Major	$12 50
Minor	6 00
Administering general anaesthetic	5 00 to $10 00
Testimony before Commission	12 50

Fractures

	Operations	Subsequent visits Hospital or Home	Office
Reduction and first dressings—			
Nasal bones	$12 50		

Metacarpal or metatarsal bone	7 50		
Phalanx	5 00		
Carpal or tarsal bone	7 50		

(For operative procedures special fees)

Forearm—leg, 1 bone	12 50		
2 bones	30 00	$1 75	$1 25
Femur or humerus	40 00		
Clavicle or scapula	20 00		
Patella	20 00		
Mandible or maxilla	20 00		
Pelvis	25 00		
Ribs	6 00		

For compound or comminuted fractures or fractures involving joints, add 50 per cent to this list to find **minimum** fee.

For bone plating or bone splinting or inlay (when authorized) three times fee for simple fracture.

Dislocations

Fees according to magnitude and time consumed		1 75	1 25

Sprains

Fees according to magnitude and time consumed		1 75	1 25

Amputations

Finger or toe	7 50		
Two fingers or toes	12 00		
Hand, wrist, forearm or arm	30 00		
Shoulder disarticulation	50 00	1 75	1 25
Foot, ankle or leg	30 00		
Knee or thigh	75 00		
Hip disarticulation	100 00		

Special Operations and Procedures

	Operations	Subsequent visits Hospital	Home or Office
Trephining or resection of skull	$60 00		
Laminectomy	100 00		
Hernia, radical operation	40 00		
Hernia—by taxis	According to difficulty and to time consumed		
Hernia—by reduction and applying truss			

Paracentesis thoracis	$10 00		
Paracentesis pericardii	25 00		
Tenoplasty (depending on magnitude of operation, number and depth of tendons, whether recent or old and on tissues lost)		$1 75	$1 25
Burns, involving one hour attendance	25 00		
Cataract operation	50 00		
Detention per hour with patient	6 00		
Giant magnet use—(in accordance with difficulty and time consumed)			
Laparotomy (in accordance with difficulty and time consumed)			
Semilunar cartilage removal	50 00		
Catheterization of urethra	5 00		

Eye Operations

Removal of foreign body from conjunctiva (one or more)	3 00	1 75	1 25
Removal of foreign body from cornea	5 00		
Enucleation of the eye	40 00		

Minor Operations

(Fees according to magnitude and time consumed)

THE GENERAL POLICY OF THE INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA IN RELATION TO HERNIA

Effective June 17, 1920.

1. The fact that a workman may have a predisposition to hernia is not a defense, but there should be proof of an injury sufficient to establish as a fact that the major cause of the hernia was the injury and not the predisposition.

2. Any hernia which causes disability, whether complete or incomplete, brought on by a sudden strain or wrench, or by repeated strenuous efforts or heavy lifting, is compensable.

3. A chronic hernia, if enlarged, exacerbated or injured by a trauma is compensable, but subject to the provisions of Section 3, paragraph (4) of the Workmen's Compensation, Insurance and Safety Act, relating to exacerbation.

4. In all hernia cases, in order to be compensable the evidence should show an onset of sufficient severity to put the injured workman out of commission, at least for the time being, or that he reported his injury to his superior as soon as possible, with corroboration, where obtainable.

5. The compensation allowable for a hernia usually will be limited to the surgical and hospital treatment necessary to effect a radical cure, together with payment covering the disability resulting from the operation. If, however, the employer or insurance carrier unreasonably neglects or refuses to tender an operation, disability payment, total or partial, may be allowed for the time prior to the determination of the issue.

6. A reasonable settlement between the parties may be approved by the Commission where, by reason of age, or physical condition, an operation for the cure of a hernia is not advisable.

ILLINOIS INDUSTRIAL COMMISSION FORMS.

Prepared by George A. Schneider, Counsel for the Commission*.

Form 10 (Non-fatal Cases.)

STATE OF ILLINOIS,

INDUSTRIAL COMMISSION

APPLICATION FOR ADJUSTMENT OF CLAIM

Notice of Disputed Claim and Memorandum
of Names and Addresses

(This form to be filed in duplicate.)

---------- Petitioner,	
vs.	No.
---------- Respondent.	

*Author of "The Workmen's Compensation Act of the State of Illinois," a text book devoted exclusively to Illinois decisions.

The petition of the undersigned respectfully shows to this Honorable Commission the following, to-wit:

1. That on the _____ day of _____, 19____ _____ was injured by reason of an accident arising
(Name of person injured)
out of and in the course of h___ employment by the above named _____ _____ that your petitioner is the person injured.
(Name of employer)

2. That a dispute has arisen with respect to the compensation to be paid for the disability resulting from such injury, and the general nature of the dispute is:

(a) The employer denies liability for the compensation provided for in the Workmen's Compensation Act;

(b) A dispute exists concerning the amount and duration of the compensation payable.

3. The following particulars relative to this application are herewith given:

(a) Name of injured employee _____
Address _____

(b) Name of employer _____
Place of business and address _____

(c) Place of accident _____

(d) Nature of work upon which injured was engaged at time of accident and how caused _____

(e) State whether medical, surgical and hospital treatment were furnished by employer and, if so, to what extent; amount expended for above purposes and period treated _____

(f) Earnings of employee during year preceding injury, if employed by the same employer; if not so employed give earnings of such employees in the same class or grade _____

(g) Compensation payments received from employer:
$_____ account medical care and attendance.
$_____ per week for _____ weeks' temporary total disability.
$_____ per week for _____ weeks' partial disability.
$_____ account of other items, here enumerated: _____

4. Additional amount claimed as compensation:
(a) $_____ account medical care and attendance.
(b) $_____ per week for _____ weeks' temporary total disability.

(c) $_____ for serious and permanent disfigurement to _____

(d) $_____ per week for _____ weeks' partial disability.

(e) $_____ per week for _____ weeks' loss or loss of use of _____ under paragraph (e) of section 8.

(f) $_____ per week complete and permanent disability, including pension provided for under paragraph (f) of section 8.

5. (a) Date of service on employer of notice of accident _____

(b) If notice not served within thirty days, did any agent of employer have knowledge of the facts and circumstances of the accident

6. Give names, ages and addresses of all children under the age of sixteen years at the time of the injury:

Name _____ Address _____ Age _____
Name _____ Address _____ Age _____
Name _____ Address _____ Age _____
Name _____ Address _____ Age _____
Name _____ Address _____ Age _____

7. Your petitioner prays that the Industrial Commission appoint an arbitrator to make such inquiries and investigations as he shall deem necessary, and that a day be appointed by said Industrial Commission and the time and place thereof fixed, where said arbitrator may hear such proper evidence as the parties hereto may submit, and that an award and decision may be made, in conformity with the statute in such case made and provided.

The undersigned requests that all notices of proceedings in the above entitled matter be served personally or by registered mail upon the party whose name and address follows as attorney for petitioner; if no attorney's name appears, then to the name and address of the undersigned.

Dated this _____ day of _____ 19_____.

(Signed)_____

Address_____

Attorney for Petitioner

Address_____

Form 10-a (Fatal Cases).

Form 10-a (Fatal Cases).

STATE OF ILLINOIS,
INDUSTRIAL COMMISSION

APPLICATION FOR ADJUSTMENT OF CLAIM

Notice of Disputed Claim and Memorandum of Names and Addresses.

(This form to be filed in duplicate.)

---------- Petitioner,	
vs.	No.
---------- Respondent.	

The petition of the undersigned respectfully shows to this Honorable Commission the following, to-wit:

1. That on the ---------- day of ---------- 19---- ---------- sustained accidental injuries arising out
(Name of person killed)
of and in the course of h-- employment by the above named ----------
---------- which injury resulted in the death of said em-
(Name of employer)
ployee on, to-wit, the ---------- day of ----------, 19---; that your petitioner ---- is the ---------- of said deceased.

2. That a dispute has arisen with respect to the compensation to be paid for the disability resulting from such injury, and the general nature of the dispute is:

(a) The employer denies liability for the compensation provided for in the Workmen's Compensation Act;

(b) A dispute exists concerning the amount and duration of the compensation payable.

3. The following particulars relative to this application are herewith given:

(a) Name of injured employee _____
Address _____
(b) Name of employer _____
Place of business and address _____
(c) Place of accident _____
(d) Nature of work upon which injured was engaged at time of accident and how caused _____

(e) State whether medical, surgical and hospital treatment were furnished by employer and, if so, to what extent; amount expended for above purposes and period treated.
(f) Earnings of employee during year preceding injury, if employed by the same employer; if not so employed, give earnings of such employees in the same class or grade.
(g) Compensation payments received from employer:
$_____ account medical care and attendance.
$_____ per week for _____ weeks' temporary total disability.
$_____ per week for _____ weeks' partial disability.
$_____ account of other items, here enumerated: _____

4. (a) Date of service on employer of notice of accident _____

(b) If notice not served within thirty days, did any agent of employer have knowledge of the facts and circumstances of the accident _____

(Fill out only one of the following tables indicating which paragraph of Section 7 compensation is claimed under.)

5. That the deceased left him surviving:
(a) Name _____ his widow _____
Children:

Name _____ born the _____day of _____ 19____
Name _____ born the _____day of _____ 19____
Name _____ born the _____day of _____ 19____
Name _____ born the _____day of _____ 19____
Name _____ born the _____day of _____ 19____
whom he was under legal obligation to support.

(b) Parent, husband, child, or children totally dependent upon the earnings of deceased at the time of the injury.

Name _____ Dependency _____per cent.

(c) Parent, child, grandparent or grandchild partially dependent upon the earnings of the deceased at the time of the injury and the respective dependencies:

Name _____ Dependency _____per cent.
Name _____ Dependency _____per cent.
Name _____ Dependency _____per cent.

(d) Collateral heirs dependent upon the deceased at the time of the injury and the average annual contributions during the two years preceding the injury resulting in death:

Name _____ Contribution _____
Name _____ Contribution _____
Name _____ Contribution _____

(e) If no widow or heirs survive give amount of funeral expenses:

6. Your petitioner prays that the Industrial Commission appoint an arbitrator to make such inquiries and investigations as he shall deem necessary, and that a day be appointed by said Industrial Commission and the time and place thereof fixed, where said arbitrator may hear such proper evidence as the parties hereto may submit, and that an award and decision may be made, in conformity with the statute in such case made and provided.

The undersigned requests that all notices of proceedings in the above entitled matter be served personally or by registered mail upon the party whose name and address follows as attorney for petitioner; if no attorney's name appears, then to the name and address of the undersigned.

Dated this _____ day of _____, 19____.

(Signed) _____
(Beneficiary of the Deceased)
Address _____

Attorney for Petitioner.
Address _____
Form 20.

WORKMEN'S COMPENSATION LAW

STATE OF ILLINOIS
INDUSTRIAL COMMISSION

State of Illinois, } SS.
County of _____ }

Petitioner,

vs.

Respondent.

PETITION FOR REVIEW OF DECISION OF ARBITRATOR

Now comes _____ of _____ and respectfully petitions the Honorable Industrial Commission of the State of Illinois as follows:

The said Commission shall review the decision of the Arbitrator, duly appointed according to law, in the matter of _____ vs. _____, which decision of said Arbitrator was filed with the Industrial Commission on the _____ day of _____ 19____.

Petitioner presents herewith _____ of the proceedings before said Arbitrator upon the hearing hereof (or stenographic report of proceedings, as the case may be.)

Petitioner further represents that said decision of the Arbitrator should be reviewed by the Industrial Commission, for the following additional reasons, to-wit: (Set up any proper ground for review, in accordance with Sec. 19.)

Petitioner therefore prays that proper notice in accordance with the statute may be given to the parties interested herein and that a date may be set by the Honorable Industrial Commission for a hearing upon this petition for review, and that upon such hearing said Commission may modify or vacate the order and decision of the Arbitrator, as in the opinion of said Commission the facts and circumstances shall warrant.

And your petitioner will ever pray.

(Employer or employee, as the case may be.)

Attorney for Petitioner.

Form 24.

STATE OF ILLINOIS,
INDUSTRIAL COMMISSION

PETITION FOR REVIEW OF AGREEMENT OR AWARD

---------- Petitioner,

vs.

---------- Respondent.

Your petitioner ---------- of ---------- respectfully represents that on the ---------- day of ---------- 19---- at ---------- Illinois, an agreement (or award, as the case may be), was duly made in the above entitled matter providing for the payment of compensation growing out of an accidental injury arising out of and in the course of employment with ---------- of ----------

Your petitioner further represents that said agreement (or award, as the case may be), should be reviewed by your Honorable Industrial Commission upon the ground that his disability has, subsequent to the date of said agreement (or award, as the case may be), recurred (increased, diminished, or ended, as the case may be).

(Allege what compensation has been paid, if any, and any other facts and circumstances proper for the Commission to consider under the statute upon petition for review.)

Petitioner therefore prays that proper notices may be given to all parties interested under this petition for review, and that this petition may be set down for hearing at some date to be fixed by your Honorable Industrial Commission, and that upon such hearing upon review, said compensation payments as fixed in said agreement (or award, as the case may be), may be re-established (increased, diminished or ended, as the case may be).

And your petitioner will ever pray.

Petitioner.

Attorney for Petitioner.

Form 69.

INDUSTRIAL COMMISSION,
STATE OF ILLINOIS
Chicago, Ill.
300 City Hall Square Bldg.

State of Illinois, } SS.
County of ---------- }

SETTLEMENT CONTRACT

(Present in triplicate)

---------- Applicant,
vs. } No.
---------- Respondent.

We, the undersigned respectfully represent to the Honorable Industrial Commission:

First, that on ---------- day of ----------, 19---
---------- of ---------- was
(Name of person injured) (Address of person injured)
---------- in an accident that arose out of and while in the em-
(Killed or injured)
ployment of ---------- of ----------
(Name of employer) (Address of employer)

Second, that the following statement of particulars is not binding upon the parties, if the settlement is not approved:

(1) Place of accident ----------

(2) Description of accident and cause of injury ----------

(3) State whether medical and surgical aid, etc., treatment required and whether furnished by employer ----------

(4) Name of attending physician ---------- Address ----------

(5) Nature of injury ----------

(6) Particulars of disability, whether total or partial, and estimated duration thereof. If death resulted so state, giving date of death --------

(7) Earnings of employee --------- per week (month or annum).

(8) Amount injured person is earning, or is able to earn in some suitable employment or business after the accident ----------

(9) Payment, allowance or benefit received from employer during period of disability _____

(10) In case of death, state name, address and relationship of all dependents. _____

Terms of settlement _____
Reasons and causes forming basis of adjustment thereof _____

In consideration of the payment of the sum of $_____ dollars to _____ in weekly installments in the sum of $_____ dollars for a period of _____ weeks commencing the _____ day of _____, 19____, by _____, the employer, the parties hereto have agreed and do hereby agree to waive any and all provisions of the Workmen's Compensation Act, including the right of arbitration, and to settle and adjust said claim of said _____ against said _____, the employer, and all differences arising out of and in the said cause under the terms of the Workmen's Compensation Act of Illinois and we hereby mutually join in requesting your honorable body that the foregoing waiver of the provisions of the Workmen's Compensation Act and the foregoing contract of settlement be approved and confirmed and the parties hereto be discharged from further liability upon filing proper receipts; provided, however, that this agreement may be reviewed by the Industrial Commission upon petition of either party hereto as provided by paragraph (h) of section 19 of the Workmen's Compensation Act.

Dated this _____ day of _____, A. D. 19____.

Attorney for Applicant.

Address Telephone

Applicant.

Address Telephone

Attorney for Respondent.

Address Telephone

Respondent.

Address Telephone

Form 28.

EMPLOYER'S OR BENEFICIARY'S PETITION FOR LUMP SUM

State of Illinois, }
County of _____} SS.

_____ Petitioner, vs. _____ Respondent.	Before the Industrial Commission of Illinois.

Now comes _____ petitioner herein, and respectfully represents that ___he is (or, in death cases, say "the deceased employee was") and was on the _____ day of _____ 19____, an employee in the service of _____, an employer at _____ in the City of _____, Illinois; that both said employer and said employee were working under and subject to the provisions of the Workmen's Compensation Act, and that on, to-wit: The _____ day of _____ 19____, said employee was injured, as a result of which _____

(Here state the nature of the injury as "right arm was amputated between elbow and wrist" or "employee died.")

Petitioner further shows that said employer has paid compensation on account of said injury (or death) as follows: (State what has been paid, and in what installments, and if no compensation has been paid, so state.) _____

Petitioner further shows that employee earned as wages the sum of $_____ per week (month or annum); that under the provisions of the Workmen's Compensation Act, petitioner is entitled to compensation at the rate of $_____ per week for a period of _____ weeks. (In case of death the average annual wage and say that four times the average annual wage amounts to the sum of $_____).

(In death cases add: Petitioner further shows that ___he is a dependant of said employee, in this, that ___he is the surviving widow (child, children, as the case may be) with whom said employee lived at the time of his death, and whom he was under legal obligation to support; or in case of parents, grandparents or other lineal heirs, state that said employee contributed to petitioner's support within four years previous to the time of said injury; if the petition is presented by an administrator or executor, allege that petitioner is the duly qualified and acting administrator or executor, as the case may be, of said deceased employee.)

Petitioner further shows that ___he believes it to the best interest of the parties that compensation now due and to become due be paid in a

lump sum, for the following reasons: (Set them out, showing necessity for such payment, and proper anticipated use of the money, etc.)

Petitioner therefore respectfully prays that proper notices may be given to the interested parties, and particularly to said employer _____ _____at _____, Illinois, and that a hearing may be had at some day to be fixed by your Honorable Commission, and that upon such hearing said Commission may order the commutation of the compensation to an equivalent lump sum equal to the total sum of the probable future payments capitalized at their present value upon a three per cent. basis with annual rests in accordance with the provisions of the Workmen's Compensation Act.

And your petitioner will ever pray.

Petitioner.

Address.

Attorney for Petitioner.

Address.

EMPLOYER'S ASSENT TO THE ENTRANCE OF LUMP SUM ORDER

State of Illinois, } SS.
County of _____ }

I (or we), _____

the employer hereinbefore referred to (or an agent may say "representative of"), hereby indicate our willingness to pay the compensation hereinbefore mentioned, commuted in accordance with Section 9 of the Workmen's Compensation Act, if so ordered by the Industrial Commission of Illinois.

Post Office Address _____

(Give street and number as well as city or town.)

(INSTRUCTIONS)

Petitions should be prepared with ink in clear, legible handwriting, or typewritten if practicable.

All information should be given as indicated in the various parts of the form.

The assent of the employer must be signed by him or his authorized AGENT AND NOT BY THE EMPLOYEE OR HIS REPRESENTATIVE.

Failure to furnish all the information required will result in delay in having the petition considered.

STATE OF ILLINOIS,
INDUSTRIAL COMMISSION

PETITION TO MAKE PROOF OF DEPENDENCY

---------- Petitioner,
vs. } No.
---------- Respondent.

YOUR PETITIONER represents that on the ---------- day of ---------- A. D. 19____, ---------- sustained accidental injuries arising out of and in the course of his employment by the above named ----------, which resulted in the death of said employee on, to-wit, the ---------- day of ---------- 19____.
(Employer's name)

YOUR PETITIONER represents that ---------- is the ---------- of ---------- who sustained accidental injuries as above set forth, and that under the provisions of the Workmen's Compensation Act ----------, employer, is liable for the payment of compensation, in the amount of ---------- dollars in installments of ---------- dollars per week, and ----------, the employer, acknowledges such liability; that ---------- left him surviving your petitioner, ----------, h----------, ---------- and ----------, his only heirs at law and next of kin (or insert other beneficiaries named in (b) (c) (d) of Section 7).

YOUR PETITIONER prays that a hearing be had upon h------- petition, and that proof of dependency of ---------- and said ----------of the deceased be taken and a proper order for distribution of compensation be entered by this Honorable Commission.

Petitioner.

STATE OF ILLINOIS
INDUSTRIAL COMMISSION.

PETITION TO REDUCE OR SUSPEND COMPENSATION UNDER SECTION 19 (d).

---------- Petitioner,
vs. } No.
---------- Respondent.

YOUR PETITIONER, ----------, respectfully represents that on the ---------- day of ----------, 19----, ----------, an employee of your petitioner, sustained accidental injuries arising out of and in the course of h--- employment by the above named petitioner, and that your petitioner has provided necessary first aid, medical and surgical services, necessary hospital services, and also has paid to ----------, the employee, the sum of ---------- dollars per week as compensation.

YOUR PETITIONER represents that ----------, said employee, persists in insanitary and injurious practices which tend to imperil and retard his recovery, in that he ---------- (here state what the practices are) and that said ----------, employee, refuses to submit to such medical or surgical treatment as is reasonably essential to promote his recovery.

WHEREFORE, your petitioner prays that an order may be entered by this Honorable Commission suspending the compensation which is now being paid by your petitioner to said ----------, the employee.

Petitioner.

State of Illinois, } SS.
County of ---------- }

----------, being first duly sworn on oath, deposes and says that he is the ---------- of ----------, the petitioner and duly authorized in this behalf, and that he has read the aforegoing petition, and that it is true in substance and fact.

Jurat

CIRCUIT COURT FORMS.

PETITION FOR JUDGMENT UPON DECISION OF INDUSTRIAL COMMISSION.

State of Illinois, } SS.
County of _____ }

In the _____ Court of _____ County.

Petitioner,
vs. } No.

Respondent.

To the Honorable _____, Judge of said court.

Now comes your petitioner, _____ by _____, his attorney, and states that he is the applicant before the Industrial Commission of the State of Illinois, in the above entitled cause, and that on the _____ day of _____, 19____, the aforesaid Industrial Commission entered its final decision in said matter, and a certified copy thereof was heretofore filed with the clerk of said court on the _____ day of _____, 19____, which is made a part hereof; that in and by its said decision, the said Industrial Commission ordered, adjudged and decreed that the applicant shall have and recover of and from the respondent, _____, the sum of _____ Dollars per week for the period of _____ weeks, being the period for which compensation is payable; that the said applicant is now entitled to have and receive from the said respondent the sum of _____ Dollars, being the amount of compensation that has accrued from the _____ day of _____, 19____, to the date of the hearing as set forth in the decision of the arbitrator, and to the further sum of _____ Dollars for first aid, medical, surgical and hospital services, as provided in Paragraph (a) of Section 8 of the Workmen's Compensation Act, and that a bond for the removal of said cause to the _____ Court was fixed at the sum of _____ Dollars by the aforesaid Industrial Commission

YOUR PETITIONER further represents that none of said award has been paid and that no bond for the removal of said cause to the_____ _____Court has ever been filed to secure the payment of said award; that the statutory period for reviewing the said decision by writ of certiorari has expired; that there is now due and accrued the sum of _____ Dollars.

YOUR PETITIONER further represents that no writ of certiorari has been issued out of this court (or the Superior Court) and that no other proceeding to review such decision or award has been instituted.

YOUR PETITIONER further shows that notice and demand, in accordance with the statute, was filed with the aforesaid Industrial Commission on the _____day of _____ 19____, a copy whereof is hereto attached and made a part of this record.

YOUR PETITIONER further shows that on or before the _____ day of _____, 19 ____, _____, he demanded of _____, the respondent, the payment of compensation accrued herein, and notified him that application for judgment would be made, and that the applicant would ask the court to allow as a part of the costs the attorney fees incurred pursuant to statute, and that the said respondent has refused to pay compensation as demanded by the said applicant.

YOUR PETITIONER THEREFORE PRAYS that an order may be entered herein rendering judgment in favor of _____ the applicant, and against _____, the respondent, in the sum of _____Dollars, and that the petitioner may further have judgment for his reasonable costs and attorney fees, in accordance with the statute in such case made and provided.

State of Illinois, } SS.
County of _____ }

_____, being first duly sworn, on oath deposes and says that he has read the foregoing petition by him subscribed, and that the same is true in substance and in fact.

Subscribed and sworn to before me this _____day of_____
A. D. 19 ____

Notary Public.

___ ORDER FOR JUDGMENT UNDER PARAGRAPH (g) OF SECTION 19.

State of Illinois } ss.
County of _____ }

In the_____Court of_____County.

Petitioner,
vs. } No.

Respondent.

And now this matter coming on to be heard on the application of the said _____for judgment on the award in h_____ favor and against the said _____, heretofore made and entered by the Industrial Commission of the State of Illinois, and,

It appearing to the court that due notice of this application was given to _____ by filing notice with the Industrial Commission of the State of Illinois on the _____day of_____, 19____, a copy of which said notice was by the said Industrial Commission duly mailed to the said _____ on the _____ day of _____, 19__, in an envelope addressed to _____ with the postage fully prepaid, as more fully appears by the certificate of the mailing thereof of the Secretary of the said Industrial Commission heretofore filed in this court in this cause, and,

It further appearing to the court that on the _____ day of _____, 19____, _____, the arbitrator designated by said Industrial Commission as arbitrator in said cause found and entered of record his award and decision in and before said Industrial Commission, a certified copy of said award and decision having been heretofore filed in this court in this cause, is hereto attached and hereby made a part hereof and included in this order, and,

It further appearing to the court on inspection of the certified copy of the award of the arbitrator in said cause before the said Industrial Commission, and of which a certified transcript was heretofore filed in this cause in this court that notice of said award and decision and the time of filing thereof by the said arbitrator with said Industrial Commission of Illinois, together with due notice of the time in which the petition to review said award and decision of said arbitrator should be filed with the said Industrial Commission, was duly sent to the respondent, _____, by said Industrial Commission on the _____ day of_____, 19____, in an envelope addressed to him, postage prepaid, and,

It further appearing to the court that no petition for review of said decision of said arbritrator has been filed with said Industrial Commission by said _____, and that the award and decision of said arbitrator is and has become the award and decision of the said Industrial Commission in said cause, and,

It further appearing to the court that the said award allowed the said _____ compensation for a period of _____ weeks, being the period of _____ at the rate of_____ dollars per week, making a total for that period of _____ dollars, and,

It further appearing to the court that the said award allowed said _____ the further sum of _____ dollars per week for a period of _____ weeks for the permanent_____ making a total allowance of _____dollars; and,

It further appearing that the said award and decision allowed the said _____ the sum of _____ dollars for first aid, medical, surgical and hospital services, and,

It further appearing that the total amount of the award for compensation and first aid, medical, surgical and hospital services is _____ dollars, and,

It further appearing to the court that said _____ has not been paid any part of said award since the same was made and entered on the _____ day of _____ 19, ____, by said arbitrator and has refused to pay the same after demand duly made by the said _____, and has not at any time paid any part of said award, and,

It further appearing to the court that said _____ is entitled to interest on the past due installments of said award at the rate of 5 per centum per annum as long as the same remains due and unpaid, and that the accrued interest to date on the said unpaid past due installments amounts to _____dollars, and,

It further appearing to the court that compensation under said award has accrued from the _____ day of _____, 19__, to the____ day of _____, 19____, being _____ weeks, amounting to _____ dollars for first aid, medical, surgical and hospital services amounts to the sum of _____ dollars now past due, and,

It further appearing to the court that _____, the petitioner, is entitled to have and recover the sum of _____ dollars as and for reasonable attorney fees incurred by him in this matter.

NOW, THEREFORE, it is considered and ordered by the court that the said _____ do have and recover of the said _____ the sum of _____ dollars per week from the_____ day of _____, 19____, for _____ weeks with interest at the rate of 5 per cent. per annum on the past due installments amounting to _____ dollars and _____ dollars allowed to said _____ for first aid, medical, surgical and hospital services and _____ dollars as and for his reasonable attorney fees in this behalf incurred and the cost of this proceeding.

NOW, THEREFORE, it is considered and ordered that the said _____ have execution for the said sum of _____ dollars now due, together with his costs in this court, and _____ dollars for his attorney fee, and have leave to apply from time to time for execution for the said future installments as the same become due and payable, according to the terms of said award and decision aforesaid.

SHORT FORM OF ORDER AFFIRMING AWARD ON WRIT OF CERTIORARI.

State of Illinois, County of ---------- } SS.

In the----------Court of----------County

Petitioner,

vs. } No.

Respondent

This cause coming on to be heard on writ of certiorari upon the application of ---------- to review the decision and award of the Industrial Commission of the State of Illinois, and the court having inspected the record returned by the said Industrial Commission in response to the writ of certiorari, and having heard the arguments of counsel, and being fully, advised in the premises, finds no errors of law appearing on the said record, and,

It is, therefore, ordered, adjudged and considered by the court, that the decision of the Industrial Commission of the State of Illinois entered by the said commission on the ---------- day of ----------, 19---, be and the same is hereby in all things confirmed.

ORDER FOR A JUDGMENT UNDER SECTION 19 (g).

State of Illinois, County of ---------- } SS.

IN THE CIRCUIT COURT OF ---------- COUNTY

vs.

And Industrial Commission of the State of Illinois.

This cause having come on to be heard upon the application of said plaintiff for the entry of a judgment in accordance with the decision and award of the Industrial Commission of the State of Illinois, in a certain cause in which the said plaintiff was applicant and the said defendant, respondent, being case No. ------ in the office of said Commission, and a certified copy of said decision having been duly filed herein; and it appearing from said certified copy of said decision that the said

plaintiff is entitled to have and recover of and from the said defendant the sum of $_____ to be paid in a lump sum in accordance with the terms of said decision:

And it further appearing to this court that said defendant has due notice hereof, and has waived the statutory fifteen day notice in such cases, and the court having inspected said, certified copy of said decision of the Industrial Commission and being now fully advised in the premises:

IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED by the court that the plaintiff have and recover of the said defendant the sum of $_____ and costs of said suit herein taxed at $_____ and that judgment be entered therefor.

Judge.

ORDER SETTING ASIDE DECISION OF COMMISSION AND QUASHING RECORD.

State of Illinois, } SS.
County of _____ }

IN THE CIRCUIT COURT OF _____ COUNTY

_____ }
vs.
_____ }
And Industrial Commission of the State of Illinois.

This case coming on to be heard upon the record of the Industrial Commission and upon the Writ of Certiorari issued out of this court and the return thereto, and the court being fully informed as to said record and having reviewed all questions of law presented thereby, and having heard the arguments of counsel and being fully advised in the premises herein, doth find as follows:

That it has jurisdiction of the parties hereto and the subject matter therein, and that it does not appear from the record that the said _____,they being employers of _____, the respondent, were within the provisions of the Workmen's Compensation Act, in force at the time that the said _____, employee, received the injuries complained of.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED by the Court that the decision and award of the Industrial Commission of the State of Illinois, dated the _____ day of _____, A. D. 19___, whereby the award of arbitration, _____, in favor of said _____ filed the _____ day of _____, A. D. 19___, was confirmed

and ordered to stand as and for the decision of said Industrial Commission, be and the same is hereby vacated and set aside, and in all things for naught esteemed, and that the said record in said cause be and the same is hereby quashed.

Judge.

ORDER REMANDING CAUSE TO INDUSTRIAL COMMISSION WITH DIRECTIONS.

State of Illinois, } SS.
County of ---------- }

IN THE CIRCUIT COURT OF ---------COUNTY

vs.

And Industrial Commission of the State of Illinois.

Gen. No---------

This cause coming on to be heard upon the writ of certiorari to the Industrial Commission of Illinois, and the return of said Commission thereto, and it appearing from and on the record that this Court has jurisdiction of the parties and the subject matter herein, and the parties hereto being represented by their counsel upon this hearing, and the court having examined the record herein and having heard the arguments of counsel:

The Court finds that the decision and award entered by said Industrial Commission on, to-wit, the ------day of ----------, A. D. 19--, is ambiguous, indefinite and uncertain, and this Court is unable to tell from the examination of said decision and award whether ----------

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the decision and award of the Industrial Commission of Illinois in the above entitled cause be, and the same is hereby vacated and set aside, and that the cause be, and the same is hereby remanded to the Industrial Commission for further proceedings on said record touching the question of[1] ----------, and said Industrial Commission is directed to hear further testimony touching---------- and the merits of the claim, and to make and return to this Court a new finding and decision upon the record heretofore certified by said Commission to this Court, and to return and recertify to this Court such further evidence and proceedings as may be had or taken under this order.

Judge.

1 Here insert necessary directions.

JUDGMENT UNDER SECTION 19 (g) ON LUMP SUM AWARD.

State of Illinois, } SS.
County of ---------- }

IN THE CIRCUIT COURT OF —— COUNTY

---------- }
vs.
---------- } Gen. No. --------
And Industrial Commission of the State of Illinois.

This cause having come on to be heard upon the application of said plaintiff for the entry of a judgment in accordance with the decision and award of the Industrial Commission of the State of Illinois in a certain cause in which the said ----------, plaintiff, was applicant, and the said ----------, defendant, respondent, being case No. ----------, in the office of said Commission, and a certified copy of said decision having been duly filed herewith; and it appearing from said certified copy of said decision that the said plaintiff is entitled to have and recover of and from the said ----------, defendant, the sum of ---------- ($), to be paid in a lump sum in accordance with the terms of said decision.

And it further appearing to this Court that said ----------, defendant, has had notice hereof, and the Court having inspected said certified copy of said decision of the Industrial Commission of Illinois and being now fully advised in the premises,

IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED that ----------, the plaintiff, have and recover of the said defendant the sum of ---------- dollars ($), and costs of said suit herein taxed at ---------- dollars ($), and that judgment be, and the same is hereby entered therefor.

Judge.

ORDER REMANDING CAUSE AND DIRECTING INDUSTRIAL COMMISSION TO ENTER FINDINGS

State of Illinois, } SS.
County of ---------- }

IN THE CIRCUIT COURT OF----------COUNTY.

vs.	

The Industrial Commission of the State of Illinois.	

This cause coming on to be heard upon the writ of certiorari to the Industrial Commission of the State of Illinois, and the return of said Commission thereto, and it appearing to the court from the record that it has jurisdiction of the parties and the subject matter herein, and the parties hereto being represented by their counsel upon this hearing, and the court having examined the record herein and having heard the argument of counsel:

That as a matter of law in the absence of other evidence, the accidental injury sustained by said decedent arose out of and in the course of the employment as shown by the record.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the decision of the Industrial Commission be, and the same is hereby set aside, and that this cause be and the same is hereby remanded to said Industrial Commission with directions to enter its findings, and for further findings upon the evidence heretofore taken, and such further competent evidence as either party may submit, and that it certify their proceedings and findings and decision back to this court, both parties having in open court waived the issuance of any new writ of certiorari.

Judge.

SUPREME COURT FORM.

FORM OF PETITION FOR WRIT OF ERROR IN THE SUPREME COURT.

----------	Writ of Error to
Petitioner,	---------- Court of ----------
vs.	County
	On Writ of Certiorari from ----------
Industrial Commission of Illinois and	Court of ----------
----------	County to the Industrial
Respondents,	Commission of Illinois.

Honorable ----------, Trial Judge.

Petition for Writ of Error.

To the Honorable Justices of the Supreme Court of Illinois:

YOUR PETITIONER, _____, respectfully prays this court to grant a Writ of Error directed to the _____ Court of _____ County to require the above entitled case to be certified to this Court pursuant to the provisions of the Workmen's Compensation Act, Section 19 (f) (3) and in support thereof, represents to the Court as follows:—

This action was brought by _____ by filing an application for adjustment of claim with the Industrial Commission of Illinois on the _____ day of _____, 19___; hearing was duly had before an arbitrator appointed by said Commission, and an award entered in favor of the applicant requiring the respondent to pay to the applicant _____ dollars per week for a period of _____ weeks for (here set out paragraph and section under which the award has been made and the nature of the injury sustained).

Petition for review and stenographic report and proceedings before the arbitrator were duly filed with the Industrial Commission, and the Industrial Commission on the _____ day of _____ 19___, found the decision of the arbitrator to be correct and ordered that the arbitrator's decision stand as the decision of the Industrial Commission (here state such disposition as was made by the Industrial Commission).

A writ of certiorari was sued out of the Circuit Court by the petitioner, and the Circuit Court upon consideration of the case confirmed the finding and decision of the Industrial Commission.

The issue now presented to this Court is whether there is any _____(state whatever the issue is).

THE FACTS.

(Here state the facts as they appeared on the hearing before the Industrial Commission, referring to the pages of the Abstract of the Record as the facts are detailed.)

ASSIGNMENT OF ERRORS.

1. The Circuit Court erred in confirming the award and decision of the Industrial Commission.
2. The award and decision of the Industrial Commission are contrary to the law.
3. The award and decision of the Industrial Commission are contrary to the evidence.

4. The decision of the Industrial Commission is based upon erroneous legal conclusions drawn from the evidence and findings of fact.

(And state such other errors as may be relied upon.)

BRIEF.

(Here state the points and authorities relied upon for the issuance of the writ.)

ARGUMENT.

(Herein a discussion of the points and authorities relied upon for the issuance of the Writ of Error.)

Note.—By Rule 43 oral arguments will not be heard by the Supreme Court upon the application for a Writ of Error.

To preserve your rights under the law you must mail this notice, properly filled out and signed by you, or by someone for you, by registered letter to the Bureau of Workmen's Compensation, within thirty days after your injury.

NEW YORK FORMS

STATE INDUSTRIAL COMMISSION

DIVISION OF CLAIMS } **EMPLOYEE'S FIRST NOTICE OF INJURY**
Case No._____ NY
Case of_____

Full Name of injured employee _____
Address _____
Name of employer _____
Address _____
Address where accident happened _____
Date of Accident _____, 19____, at _____M.
Cause of accident _____

Nature and extent of injury _____
Are you likely to be disabled more than two weeks? Careful answer must be given? _____
Have you notified your employer? _____
When? _____
How? (By delivery of notice or by registered letter) _____
What was your daily wage? _____
Did your employer or his superintendent or foreman have knowledge of

the accident?_____ Name of such person _____
Did you request your employer to furnish medical service? _____
Has he done so? _____
Name of attending physician _____
Address _____
Signed, this _____ day of _____, 19____
(Sign here) _____
(Full name)
Address _____
(Give here address to which mail should be sent)
(See other side)

Detach here——fill out lower part and DELIVER THIS TO YOUR EMPLOYER

To preserve your rights under the law, you must have delivered or mailed by registered letter to your employer within thirty days after your injury this report properly filled out and signed by you or someone for you.

STATE INDUSTRIAL COMMISSION

DIVISION OF CLAIMS
Case No. _____NY
Case of_____

EMPLOYEE'S FIRST NOTICE OF INJURY

_____N. Y. _____19__

(Employer)

(Address)

I hereby notify you, as required by law, that I was injured at _____M. on the _____ day of _____19___, at _____
(Location where injury occurred)
My injury was caused by _____

The nature and extent of my injury is _____
I am now at _____
(State where at present)
I am being attended by Dr. _____ and I now request, as required by law, that you provide me with such medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus as may be required, during the sixty days after the injury, and if my disability extends beyond fourteen days duration or if death ensues, I make claim for compensation according to law.

(Sign here) _____
(Full name)
Address to which mail should be sent _____

1707

W. C.—45

WORKMEN'S COMPENSATION LAW

STATE INDUSTRIAL COMMISSION

DIVISION OF CLAIMS) **EMPLOYER'S FIRST REPORT**
CASE No. _____**NY**} **OF INJURY**
Case of_____)

Employer's name _____
Office address _____
(Street and Number, city or village and county)
Business, (goods produced, work done or kind of trade or transportation)

(Be sure to give this accurately)
Average number of employees _____
Location of plant or place of work where accident occurred (if not at office address) _____
(Street and Number, city or village and county)
Date of accident _____day of _____, 19____; hour of day _____ A. M., P. M.
Did accident happen on the premises? _____
Away from the plant of employer? _____
If away from the plant, state where _____
Full name of injured employee _____
Address _____
(Street and number, city or village and county)
Sex _____ Age _____
Single, married, widowed or divorced _____
Speak English _____ If not, what language? _____
Citizen of what country? _____
Occupation when injured? _____
If injured continued to work after his accident, state for how long?_____
Was injured employee doing his regular work? _____
If not, state regular occupation _____
How long was injured person in your employment? _____
Piece or time worker? _____
Wages or average earnings per day, including overtime? _____
Working hours per day? _____
Days per week? _____
Describe in full how the accident occured. _____

Name of machine, tool or appliance involved, if any _____
Part on which accident occurred? _____
State part of person injured and nature of injury? _____

Did injury cause loss of any member or part of member? _____
If so, describe exactly _____

Did injury result in serious head or facial disfigurement? _____
If so, describe exactly _____

Was medical attendance provided by you? _____
How soon after accident? _____
Name and address of physician _____
To what hospital was employee sent? _____
If not sent to hospital, where is he? _____
Are you still providing medical attendance? _____
Has employee returned to work? _____
Date and hour of return _____19___ _____A. M., P. M.
If so, is he fully recovered and carning full wages? _____
If not returned to work probable length of disability (give your best estimate) _____
Important—In what company is Compensation Insurance carried? (must be answered) _____
Signed at_____, N. Y., Firm name _____
this_____day of Signed_____
_____, 19____. Official title _____

Very important that every question be answered.
No typewritten signatures accepted.

INSTRUCTIONS

The employer must fill out this form and return same to the Bureau of Workmen's Compensation, at its

NEW YORK OFFICE

within ten days after every accident which causes any loss of time other than the balance of the day, turn or shift on which the accident occurred, or which requires any medical attendance other than first aid treatment. (See penalty, section 111 of the law printed below.)

In filling out this form use pen or typewriter.

If employer be the State or a political subdivision thereof, give name of person with whom to correspond about a claim.

SECTION 111 OF THE WORKMEN'S COMPENSATION LAW

Section 111. RECORD AND REPORT OF INJURIES BY EMPLOYERS.—Every employer shall keep a record of all injuries, fatal

or otherwise, received by his employees in the course of their employment. Within ten days after the occurence of an accident resulting in personal injury, a report thereof shall be made in writing by the employer to the Commission upon blanks to be procured from the Commission for that purpose. Such report shall state the name and nature of the business of the employer, the location of his establishment or place of work, the name, address and occupation of the injured employee, the time, nature and cause of the injury and such other information as may be required by the Commission. **An employer who refuses or neglects to make a report as required by this section shall be guilty of a misdemeanor, punishable by a fine of not more than five hundred dollars.**

STATE INDUSTRIAL COMMISSION
Principal Office: The Capitol, Albany, N. Y.

DIVISION OF CLAIMS
Case No. ---------- NY
Case of ----------

EMPLOYEE'S CLAIM FOR COMPENSATION

I hereby present my claim to the State Industrial Commission for compensation for disability resulting from an accident arising out of and in the course of my employment and not occasioned by my wilful intention or solely through intoxication, and in suport of it I make the following statement of facts:

Name of injured person ----------
Address ----------
(Street and number, city or village and county)
Sex ---------- Age ---------- Nationality ----------
Speak English? ---------- Married? ----------
Date of accident ---------- Hour of day ----------M.
On what date were you compelled to stop work as result of this injury? ----------
Exact location of place where accident happened? ----------
Was it at the plant or away from it? ----------
State occupation when injured ----------
How long have you worked at this occupation? ----------
How long have you worked for present employer? ----------
Were you doing your regular work when injured? ----------
Piece or time worker?---------- Wages per full day----------
How did accident happen? ----------

State fully nature of injury ----------

Name of employer ----------

Office address ----------

(Street and number, city or village and county)

Nature of business ----------

Have you returned to work? ----------

If so, when? ----------

If not, when will you be able to return? ----------

Have you received any wages (this does not mean compensation) since the date of your accident? ----------

If you have been paid your wages, to what date? ----------

Will you be able to take up regular employment when you return to work? ----------

If not, why not? ----------

Have you given your employer notice of injury? ----------

When? How? ----------

Name of attending physician ----------

Address ----------

If taken to hospital, give name and address of hospital and date ----------

Will the injury result in a permanent defect? ---------- If so, what? ----------

Did you request your employer to provide medical attendance? ----------

Has he done so? ----------

Signed, this ---------- day of ---------- 192____,

at ----------, N. Y.

(Claimant sign full name here)

(Address to which mail should be sent)

STATE OF NEW YORK }
} ss.
County of ----------}

On this ---------- day of ---------- 192___, Personally appeared before the undersigned, a ---------- in and for the said County and State, the above named ---------- ---------- to me well known, and to whom I have read the foregoing questions and answers, and all the matter above stated, and who, after being fully advised in the premises, subscribed h___ name thereto in my presence, and made oath that the foregoing statements, and each and all of them, are full and true, and are made without reservation or concealment.

Post-office address _____

(SEAL)

If you claim compensation to cover medical services use the form on opposite side, which in this work is the next form.

STATE INDUSTRIAL COMMISSION

Principal Office: The Capital, Albany, N. Y.

New York Office: 125 East 27th Street

DIVISION OF CLAIMS **Case No. _____ NY** **Case of _____**	**EMPLOYEE'S CLAIM FOR COMPENSATION FOR MEDICAL SERVICES**

READ THESE INSTRUCTIONS

Do not make a claim for an award for medical services if the employer engaged your physician or made arrangements for hospital services; for, if the employer did either of these things, it is a matter between him and the physician or hospital and the latter should send their bills to your employer.

Do not make claim for compensation for medical services if your employer, superintendent or foreman did not know you required medical services and if you did not tell one of them nor request medical services.

Make a claim for compensation for medical services if after request to your employer he refused or neglected to provide such services.

Make a claim for compensation for medical services "if the nature of your injury required treatment and your employer or his superintendent or foreman, having knowledge of such injury, neglected to provide medical or hospital services, etc."

This side of the sheet must be used solely for your claim for compensation for medical services. Use the other side for claim for compensation for disability.

I, the undersigned, in accordance with the provisions of Section 13 of the Workmen's Compensation Law hereby claim compensation for medical services, etc., for treatment for the injury sustained and fully described in my claim for money allowance herein, and in support of such claim make answer to the following questions:

1. Name of physician who treated you _____

Address _____

(Street and number, city or village and county)

2. Who engaged his services? _____

3. Physician's charges during first 60 days? $_____

Amount paid by you (if paid) $_____

4. Name of hospital, if any _____

Address _____

(Street and number, city or village and county)

5. Who engaged hospital services? _____

6. Hospital charges during first 60 days? $_____

Amount paid by you (if paid) $_____

7. Did you request your employer to provide medical services? _____

When? _____ Did he do so? _____

8. If not, what did the employer do with respect to the matter? _____

9. Name of person to whom request was made _____

His position with employer _____

10. Did you give your employer notice of the accident? _____.

When? _____ How? _____

11. Who received notice? _____

12. Did your employer know that you required medical services?_____

13. How did you know he did (if he did)? _____

14. If your employer neglected to provide medical services, upon what facts do you assert the neglect? _____

Signed this _____ day of _____ 192,____

at _____, N. Y.

(Claimant sign full name here)

(Address to which mail should be sent)

STATE OF NEW YORK }
} ss.:
County of _____ }

On this _____ day of _____, 192____, personally appeared before the undersigned, a _____ in and for the said County and State, the above named _____ _____ to me well known, and to whom I have read the foregoing questions and answers, and all the matter above stated, and who, after being fully advised in the premises, subscribed h__ name thereto in my presence, and made oath that the foregoing statements, and each and all of them, are full and true, and are made without reservation or concealment.

Post-office address _____

(SEAL)

WORKMEN'S COMPENSATION LAW

STATE INDUSTRIAL COMMISSION

Principal Office: The Capitol, Albany, N. Y.

DIVISION OF CLAIMS
Case No._____NY
Case of _____

ATTENDING PHYSICIAN'S REPORT

All questions in this blank should be answered, and the report should contain an account of all injuries, no matter how trivial. Fill out blank in ink, using pen or typewriter, and mail promptly to the Commission at its New York City office.

1. Name of injured person _____
Address _____
2. Name of employer _____
Address _____
3. Date of accident _____ 19 _____ at _____ M.
Was first treatment rendered by you? _____ When? _____
4. If not, by whom? _____
Address _____
5. Who engaged your services? _____
6. Was injured person removed to hospital? _____
Name of hospital _____
Address _____
7. Give an accurate description of the nature and extent of the injury _____

8. Will the injury result in (*a*) a permanment defect? _____
If so, what? _____

(Permanent disability, such as loss of whole or parts of fingers, etc. must be accurately marked on diagram.)
(*b*) facial or head disfigurement _____
9. Is ankylosis present? _____ If so, where and to what degree? ___

10. Previous to this accident was there loss of use of hand, arm, foot, leg or eye? _____

(Let your answer be specific.)
11. On what date do you think the injured can resume work? _____
12. State, in patient's own words, how accident occurred _____

Attending Physician.

Graduate of _____ Year _____
Dated at ____ this ____ day of _____, 19__ _____
(Address)

IMPORTANT.—Exact point of amputation and other permanent partial disabilities MUST BE KNOWN BY THE COMMISSION in order to determine compensation due injured according to permanent partial disability schedule in the law. Kindly DESCRIBE AND MARK DIAGRAMS ACCURATELY.

Very important that all questions be answered.

STATE INDUSTRIAL COMMISSION

Principal Office: The Capitol, Albany, N. Y.

DIVISION OF CLAIMS
Case No. _____NY
Case of_____

FORM OF CLAIM FOR COMPENSATION BY WIDOW IN DEATH CASE

I hereby make claim for compensation under Section 16 of Chapter 67 of the consolidated laws. My claim arises out of the death of _____ who died on _____ day of_____ 19____, as a result of injury sustained on _____ day of _____ 19__, at _____
(Location where accident happened)
in the employ of _____ (Name of Employer) of _____ (Address)
I was the wife of the deceased _____ (Name of deceased)
I have the following children who were under 18 years of age at the time of death of my husband.

NAMES	DATE OF BIRTH
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

I was born _____
I was married to the deceased on the _____ day of _____ 1__ at _____
(Place where married)

To the best of my knowledge the deceased was earning at the time of the injury wages at the rate of $_____ per day.

(Signature of Claimant)

(Address)

Dated this _____ day of _____ 19 --

AFFIDAVIT

STATE OF NEW YORK, COUNTY OF _____,ss.:

On this _____ day of_____, A. D., 19___, personally appeared before me the above named _____, and made oath that the answers by _____ above named and subscribed are true.

(Seal) Notary Public.

Address _____

"Child" shall include a posthumos child, a child legally adopted prior to the injury of the employee; and a stepchild or acknowledged illegitimate child dependent upon the deceased.

STATE INDUSTRIAL COMMISSION

Principal Office: The Capitol, Albany, N. Y.

DIVISION OF CLAIMS **Case No.** _____**NY** **Case of**_____	**FORM OF CLAIM FOR COMPENSATION BY THE DEPENDENTS (OTHER THAN WIDOW) IN DEATH CASE**

To The State Industrial Commission:

I hereby make claim for compensation under section 16 of chapter 67 of the Consolidated Laws and in support of my claim make answer to the following questions, such answers unless otherwise stated, relating to the time of the death of deceased.

My claim arises out of the death of _____ who died on _____day of _____ 19___, as a result of injury sustained on _____ day of _____ 19___, in the employ of _____ of _____
(Name) (Address)

1. What was deceased's daily wage? $ _____
2. Is deceased survived by widow or children? _____

If so, name them: _____, _____

_____ _____

(Name) (Address)

_____ _____

(Name) (Address)

_____ _____

(Name) (Address)

3. Is deceased survived by any other dependents? _____

If so, name them and state relationship of each to deceased:

_____ _____ _____

(Name) (Address) (Relationship)

_____ _____ _____

(Name) (Address) (Relationship)

_____ _____ _____

(Name) (Address) (Relationship)

4. What was your relationship with deceased? _____

5. Were you wholly or partially dependent upon the deceased for your support? _____

6. If partially dependent, to what degree? _____

7. Deceased contributed the value of $_____ weekly to my support.

8. This contribution consisted of $_____ in money and $_____ in other things such as _____

9. What amount weekly was required for your support? $_____

10. What other sources of income do you have? _____

(Let your answer be complete, giving amounts derived from each source named)

11. I own property as follows: Real estate from which I receive an income of $_____ annually and on which there is an indebtedness of $_____; notes, stocks, bonds or mortgages from which I receive $_____ annually.

12. I was born on the _____ day of _____, 1____

13. I reside at _____

(Street and number, city or village and county)

(Signature of Claimant)

(Address)

Dated this _____ day of _____

_____ 19____

AFFIDAVIT

STATE OF NEW YORK, COUNTY OF _____ss.:

On this _____ day of _____, A. D., 19___, personally appeared before me the above named _____ and made oath that the answers by _____ above named and subscribed are true.

Notary Public.

Address _____

(Seal)

WORKMEN'S COMPENSATION LAW

STATE INDUSTRIAL COMMISSION

Principal Office: The Capitol, Albany, N. Y.

Case No. ---------- NY	**JOINT REPORT OF AGREEMENT AS TO PAYMENT OF COMPENSATION**
Case of ----------	
Employer ----------	
Carrier ----------	Examined by: ----------

We, ---------- Address ----------
(Name of Injured Employee) (Street and Number, City or Town)
and ---------- Address ----------
(Name of Employer) (Street and Number, City or Town)
have reached an agreement in regard to compensation for the injury sustained by said employee, and submit this joint report of such claim and agreement. We agree that the facts herein stated are the basis of a claim made and to be paid in strict accordance with the Compensation Law; and we further agree to receive and to pay compensation or death benefit upon the basis of such claim, as may be determined from the nature, extent, duration and result of the injury described herein and as may be awarded by the State Industrial Commission.

1. Date of accident ----------
2. Date quit work ----------
3. Nature of injury ----------

4. Wages per day $----------
5. Compensation rate per week $----------
6. Amount paid at time of this agreement $----------
7. Will further compensation be paid ----------

---------- ----------
(Employee or Principal Dependent) (Employer)
---------- by ----------
(Relationship to Deceased if Death Case)

NOTE.—It is the duty of the employer to file this report with the Commission within ten days after the agreement is made (Section 20). It should be accompanied by the receipt of payment made which payment shall not be less in the aggregate than the amount legally due at the time of the making of the agreement. The law requires such receipt to be forwarded to the office of the Commission within forty-eight hours of its issuance (Section 20a).

STATE INDUSTRIAL COMMISSION

BUREAU OF WORKMEN'S COMPENSATION

Principal Office: Albany

Case No. _____NY

_____, N. Y., _____, 191__
(Place) (Date)

Received from _____, employer, _____ dollars and _____ cents ($_____), being payment made by said employer under the provisions of the Workmen's Compensation Law, to _____, employee, for compensation on account of disability resulting from injury sustained by said employee on _____, 191__ at _____, N. Y.

This payment covers a period from _____, 191__, to _____, 191__

and is made on account of

	advance payment.
	agreement award.
	claim award.
	medical services.

Check (X) the proper space to left.

Insurance Carrier _____ (Sign here) _____
(Employee)

$_____ _____
(Address)

NOTE: If disability is of more than forty-nine days' duration, then compensation must be paid for the first two weeks also.
Form CNY-110

NOTICE OF FINAL PAYMENT (MADE OR DUE) OF COMPENSATION (This is not a receipt)

Commission's Case Number must be Given.

Case No. _____ N. Y.

Injured employee _____ Address _____
Employer _____
Principal dependent (if death case) _____
Date of accident _____
Date to which compensation has been paid _____
(Let this date be the last day for which compensation is paid)
Date of return to work _____

Statement of Whole Amount of Compensation Due or Paid

Kind of disability	Number of weeks	Total amount (exclude medical)
Temporary partial		$
Temporary total		$
Permanent partial		$
Permanent total		$
Death		$
Disfigurement		$
Total (Include paid and due)		$

Description of permanent disability: _____

Medical expense only.

Whole amount $_____ Paid? Yes_____ No_____

To claimant? Yes _____ Fully _____ No _____ $_____

Has total amount been paid? _____

If not, how much has been paid? $ _____

Name of carrier _____

Date _____ (Signed) _____

By_____

When the final payment is made or due the employer or his insurance carrier shall within sixteen days send to the commission a notice on a form prescribed by the commission that such final payment is due or has been made fulfilling completely the terms of the award. (Extract from the law.)

It is well to note that this notice is required when the final payment is made or due. In case of failure so to notify the commission within the given time the commission shall assess against the employer or his insurance carrier the sum of one hundred dollars.

Case No. means the number assigned by the Industrial Commission, and must always be supplied.

In filling out the statement of amount of compensation paid, if compensation was paid for more than one class of disability make separate entries for each class. In case of death include funeral expenses paid in total amount of compensation. If compensation was paid for any kind of permanent disability (either total or partial), describe exactly in the last column the nature of the permanent injury, including both the part of the person involved (as hand, finger, eye, etc.) and the kind and extent of injury (as amputation, ankylosis, paralysis, etc.).

Form C-1

OHIO FORMS.

INSTRUCTIONS

Use this form only in cases where injury causes a disability of MORE THAN ONE WEEK.
Do NOT use this form where injury causes a disability of one week or less. Use form C-3, "Application for Payment of Medical Expenses."
Part 1 of this form MUST BE SIGNED by the injured employee.
Part 2 of this form must be filled in and signed by attending physician.
Part 3 must be executed by the employer or his authorized representative.
This application in its completed form should be forwarded not later than two weeks after date of injury to The Industrial Commission of Ohio, Department of Claims, Columbus, Ohio.

THE INDUSTRIAL COMMISSION OF OHIO

DEPARTMENT OF CLAIMS

Application for Payment of Compensation, Medical Services, Etc.

No. _____

Claim of _____
(Employer will please insert name of claimant)

Part I.

I hereby make application to the Industrial Commission of Ohio for the payment of money out of the State Insurance Fund for compensation for injuries sustained in the course of my employment, and which have not been purposely self-inflicted; and for money to pay for medical services, etc., which medical services, etc., were reasonably necessary in the treatment of my said injuries. I HEREBY AUTHORIZE The Industrial Commission of Ohio to pay any amount which such commission may award for medical services, etc., directly to person or persons rendering said service, and further allege that:—

1. Name of employer at time of injury was _____
2. Name of attending physician is _____
3. DATE OF INJURY _____ day of _____, 19____, at _____A. M. _____ P. M.
4. I quit work on account of my injury on the _____ day of _____, 19____.
5. I resumed work _____, 19_____ (If applicant has not returned to work he should state that fact)

6. Weekly wage at time of accident $_____. How long have you been receiving this wage? _____
7. I was injured while engaged in doing (state kind of work you were doing) _____

8. Accident happened in following manner: _____

9. Exact location of place of accident (department, etc.) _____

10. If services were rendered by hospital and ambulance, give name and address of:

Hospital _____

Ambulance _____

11. Age _____

Signed in presence of _____

(Signature of Applicant)

_____ Street address _____

Date _____, 19____.

☞ **Part II.**

(TO BE FILLED OUT BY THE ATTENDING PHYSICIAN)

(a) Give an accurate description of the nature and extent of the injury

Any infection _____

(b) For what period from date of accident is disability likely to exist____ weeks _____ days.

Date_____, 19___ _____

(Signature of Physician)

Street address_____

City or town_____

(The regular medical blanks will be mailed to attending physician as usual. The name of any consultant, assistant or anaesthetist will be indicated thereon.)

☞ **Part III.**

CERTIFICATE OF EMPLOYER

I hereby certify that I am _____

(Official Title)

of _____ engaged in the business of _____ in

(The undersigned employer)

whose behalf I am duly authorized to execute this certificate; that the applicant in the foregoing application sustained the injury described therein in the manner and on the date therein stated; that his weekly wage is correctly stated therein; that I have read all the statements contained in said application and know the same to be true and correct.

Date_____ 19___ _____

(Name of Person Signing Certificate

Manual_____
Risk No_____
(Do not fill out)

For_____
(Name of Employer)
Street address_____
City or Town_____

Form C-2

INSTRUCTIONS: Form must be signed by person making claim for award. Form must be filed within TWO WEEKS AFTER DATE OF DEATH. Mail to "The Industrial Commission of Ohio, Department of Claims, Columbus, Ohio."

BEFORE THE INDUSTRIAL COMMISSION OF OHIO

In the Matter of the death of

No. _____
FIRST NOTICE OF DEATH AND PRELIMINARY APPLICATION

I hereby make application to THE INDUSTRIAL COMMISSION OF OHIO for the payment of money out of the State Insurance Fund on account of the death of _____, resulting from the injuries hereinafter described, and hereby request that all forms necessary for the proper proof of my claim be furnished to me, free of charge.

I further state that the following statements are true, to the best of my knowledge:

1. Name of deceased person _____
 Who resided at _____
 (Street and Number). (Post Office)
 Sex____ Nationality _____ Age ____ Married or Single_____
2. Name of employer _____
 Office address _____
 (Street and Number). (Post Office)
 Nature of business _____
3. Date of accident _____ Hour of day _____M.
4. Exact location of place where accident happened? _____

5. How did accident happen? _____

6. State fully nature of injury which caused death of deceased _____

7. Give date of death _____, Hour of day _____M
8. Name of attending physician _____
Address _____
9. Name of Undertaker _____
Address _____
10. Did deceased have any one dependent upon him for support, either wholly or partially? _____
11. Give names and present address of dependents: _____

Date _____ _____
(Signature of Claimant)

(Must be filled out by some one duly authorized by the employer)

CERTIFICATE OF EMPLOYER

Manuel_____
Risk No. _____
(Do not fill out)

The person first above named was, on the date shown herein, an employe of the undersigned.

(Name of Employer)
Signed by: _____

Form C-3

IMPORTANT NOTICE

Use this form only in case where injury causes a disability of ONE WEEK OR LESS.

Do NOT use this form where injury causes a disability of MORE THAN ONE WEEK. Use Form C-1.

THIS IS AN APPLICATION FOR PAYMENT OF MEDICAL EXPENSES ONLY.

Have the OTHER SIDE of this form filled out and signed by the ATTENDING PHYSICIAN.

Mail to "THE INDUSTRIAL COMMISSION OF OHIO—DEPARTMENT OF CLAIMS—COLUMBUS, OHIO." See instructions on other side.

THE INDUSTRIAL COMMISSION OF OHIO

Department of Claims

No._____
Case of_____

First Notice of Injury and Application for Payment of Medical Expenses

I hereby make application to THE INDUSTRIAL COMMISSION OF OHIO for the payment out of the State INSURANCE FUND of medical expenses incurred on account of the injury to me described herein.

I hereby authorize said Commission to pay any amount which said Commission may award for medical services, etc., directly to the person or persons rendering said services, etc.

The following statements of fact are true, to the best of my knowledge and belief:

1. Name of injured person _____
 Address _____, _____
 (Street and Number) (Post Office)
 Sex _____ Nationality _____ Age _____
2. Name of employer _____
 Office Address _____, _____
 (Street and Number) (Post Office)
 Nature of business _____
3. Date of accident _____ Hour of day _____M.
4. Exact location of place of accident (Name of department, etc.)_____
5. Injury was received in the course of my employment while I was:_____
 (Give accurate statement of kind of work you were doing when injured)
6. The nature of my injury is described in report of attending physician on the other side of this application.
7. Injury will NOT disable me more than one week.
8. If taken to hospital, give name and address of hospital _____
9. If ambulance was used, give name and address of ambulance company _____

Date of this application:

_____ _____
(Signature of injured person)

Manual No. Risk No.	(Must be filled out by some one duly authorized by the employer)
.....	**CERTIFICATE OF EMPLOYER**
Auditing Department Record Clerk.	The person first above named was, on the date shown herein, an employee of the undersigned, and was injured as described herein.
MEDICAL SERVICES	
..... $.....	(Name of Employer)
..... $.....	
..... Examiner.	

(For Department Use. Do Not Fill out) Signed by:

ATTENDING PHYSICIAN'S REPORT AND FEE BILL

INSTRUCTIONS

This form, when properly filled out on both sides, constitutes a complete claim for payment of MEDICAL EXPENSES from the STATE INSURANCE FUND. No other reports are required.

THIS FORM IS TO BE USED ONLY IN CASES OF INJURY WHERE DISABILITY DOES NOT LAST OVER ONE WEEK.

If more than one treatment is required form should be retained by injured employee, employer or the attending physician until last treatment is rendered. Form should then be completed and mailed to the address shown on other side.

1. Give an accurate description of the nature and extent of the injury ---

2. Describe the treatment ---

3. Was hospital, nursing or X-ray services necessary and ordered by you? Give name and address of party rendering service ---

4. Was the case infected? ---------- If so, when? ---

5. Has injury resulted in a permanent disability? If so, what? ---

6. Was the treatment covered by fee bill below rendered solely on account of injury described above? ---

FEE BILL

DATE		ITEMS	AMOUNT	
----------	----	----------	---------	-------
----------	----	----------	---------	-------
----------	----	----------	---------	-------
----------	----	----------	---------	-------
		Total ---------	---------	-------

(Physician must write plainly in signing report and give full address)

Date of this report:
(Physician or Hospital)

Graduate of Address
(Street and No.)

Year
(Post Office)

xForm C-5 (To be used in case of death).

Fill out blank in ink, using pen or typewriter.

Application for awards in all cases of injury resulting in death must be made by the executor or administrator or beneficiary of the decedent, or by the attending physician or undertaker where there is no beneficiary, NOT LESS THAN TWO WEEKS NOR MORE THAN SIX MONTHS after the death of the injured employee.

BEFORE THE INDUSTRIAL COMMISSION OF OHIO

In the Matter of the Claim of

for an Award on Account of the Death of

No. ----------

APPLICATION.

I hereby make application to THE INDUSTRIAL COMMISSION OF OHIO for the payment of money out of the STATE INSURANCE FUND for compensation on account of the death of ---------- (hereinafter referred to as "deceased"), and for money to pay for medical and funeral services, etc., incurred in connection with the injury and death of deceased, and allege that:

(A) Deceased was employed at the time of injury causing death by

Address _____

(B) Deceased received an injury while in the course of employment on the _____ day of _____, 19____.

(C) Said injury consisted of _____

(D) Said injury resulted in the death of deceased on the _____ day of _____, 19____.

(E) I bear the relation of _____ to deceased.

(F) I was _____ dependent on deceased for support
(wholly or partially).
at the time of his (her) death.

(G) This application is made on behalf of myself and the following named persons who were also dependent on deceased for support:

NAME	Age.	Relationship to deceased	Wholly or partially

I hereby authorize The Industrial Commission of Ohio to pay any amount which said Commission may award for medical and funeral services, etc., direct to the person or persons rendering said services, etc.

I attach hereto additional proof in support of my claim of dependency as follows: _____

In support of my foregoing application, I hereby make answer to the following questions:

1. Give total amount paid to deceased as wages during year immediately preceding date of injury causing death: $_____

2. How many days did deceased work during said year? _____

3. What weekly amount was contributed by deceased to the support of yourself and the above named persons? _____

4. Have you, or any of the persons named above, any income other than the amounts contributed by deceased? _____
If so, state nature and amount of same: _____

5. Were the amounts received by you from deceased paid by him for board, or were said amounts paid for the purpose and actually used for the support of yourself and the persons named above? _____

6. Was deceased residing with you at time of his death? _____
If not, why? _____
(If application is made by widow, state whether a divorce has

been secured by either party, and if not, mention circumstances causing

separation, and date of such divorce or separation).

7. Give date of last contribution of money made to you by deceased, and state whether same was in form of a check, money order or cash:____

I hereby submit the following additional proof in support of my claim:

Signed in the presence of:

(Signature of Applicant)

AFFIDAVIT OF APPLICANT.

STATE OF OHIO, COUNTY OF ---------- ss:

---,

being first duly sworn, says that the facts stated in the foregoing application are true.

(Signature of Applicant)

Sworn to and subscribed before me, the undersigned authority, on the ---------- day of ----------, 19----

(Seal) (Title of officer taking acknowledgement)

INSTRUCTIONS: Fill out blank and mail to "THE INDUSTRIAL COMMISSION OF OHIO—DEPARTMENT OF CLAIMS—COLUMBUS, OHIO." If application is made by widow of deceased, certified copy of marriage certificate must accompany application.
Form C-19.

NOTE TO PHYSICIAN OR HOSPITAL: Fill out this fee bill and mail to "The Industrial Commission of Ohio—Department of Claims—Columbus, Ohio," immediately upon completion of treatment.

THE INDUSTRIAL COMMISSION OF OHIO
COLUMBUS, OHIO

DEPARTMENT OF CLAIMS

Claim No. ----------
Employee: ----------
Employer: ----------
Date of Injury: ----------

FEE BILL

DATE	ITEMS	AMOUNT
Total		

(Items should be written out fully. Do not abbreviate)

BE SURE TO ANSWER IN DETAIL THE QUESTIONS ON THE REVERSE SIDE

CERTIFICATE

The undersigned hereby certifies that services have been rendered for the employee named herein, as shown above, and that said employee is able to resume work, beginning on the _____ day of _____., 192____.

(Physician or Hospital)

Address _____
(Street and No.)

(Post Office)

(It is important that the above certificate be filled out in every case.)

The following questions should receive the attending physician's careful attention as they are necessary to the prompt and efficient handling of all the medical bills in this case, and also are necessary for the payment of future compensation to the claimant.

1. Describe the injury fully _____
2. Was recovery delayed—If so why? _____
3. Was secondary operation necessary? _____
4. If hospital service was unusually long, why was this necessary? _____
5. Has the claimant a permanent injury? _____
6. Is he able to do light work? _____
7. In your opinion when will he be ready for light work? _____
8. Was the case infected—If so, when? _____
9. Will additional treatment or operative procedure improve the claimant's condition? _____
10. State the character and number of treatments rendered at your office, at the home and at the hospital in this case _____

Form C-24

NOTE.—Fill out this report and return AT ONCE to The Industrial Commission of Ohio, Department of Claims, Columbus, Ohio.

THE INDUSTRIAL COMMISSION OF OHIO

COLUMBUS, OHIO

DEPARTMENT OF CLAIMS

Claim No. _____
Employee: _____
Employer: _____
Date of Injury: _____

Attending Physician's Report And Fee Bill.

All questions in this blank should be answered, and the report should contain an account of all injuries, no matter how trivial. Fill out blank in ink, using pen or typewriter.

1. Name of injured person _____ Address _____
 Age of injured: _____ Date of first treatment by me _____
2. Give an accurate description of the nature and extent of the injury _____
3. Describe the treatment _____
4. Did another physician act as assistant, consultant or anaesthetist? Name and address _____
5. Was hospital, nursing or X-ray services necessary and ordered by you? _____
 Give name and address of party rendering service _____
6. Was the case infected? _____ If so, when? _____
7. Has injury resulted in a permanent disability? If so, what? _____
8. Was the treatment covered by fee bill below rendered solely on account of injury described above? _____
9. What period of disability was caused by injury? _____ days.

FEE BILL

DATE	ITEMS	AMOUNT
_____	_____	_____
_____	_____	_____
	Total	_____

Date of this report: _____ _____
(Physician or Hospital)
Graduate of _____ Address _____
(Street and No.)
Year _____ _____
(Post Office)

Form C-26. NOTE:—Fill out this report and return AT ONCE to The Industrial Commission of Ohio, Department of Claims, Columbus, Ohio.

THE INDUSTRIAL COMMISSION OF OHIO

COLUMBUS, OHIO

DEPARTMENT OF CLAIMS

Claim No. _____
Employee: _____
Employer: _____
Date of Injury: _____

ATTENDING PHYSICIAN'S REPORT.

All questions in this blank should be answered, and the report should contain an account of all injuries, no matter how trivial. If trivial injuries questions Nos. 1, 2, 3, 8 and 9 should be answered. Other cases require full report. Fill out blank in ink, using pen or typewriter.

1. Name of injured person _____ Address _____
 Age of injured: _____ Date of first treatment by me _____
2. Give an accurate description of the nature and extent of the injury___

3. Describe the treatment _____
4. Did another physician act as assistant, consultant or anaesthetist? Name and address _____
5. Was hospital, nursing or X-ray services necessary and ordered by you? _____
 Give name and address of party rendering service _____
 My estimate of necessary hospital or nursing attention is _____ weeks _____days.
6. Is present disability due entirely to this injury? _____ If not, state contributing cause _____
7. Is there evidence of syphilis? _____ Gonorrhoea? _____
 Tubercular infection? _____ Alcoholism? _____
 Infection? _____ Occupational disease? _____ Neurasthenia? _____
 Hypochondriasis? _____ Hysteria? _____ Malingering or Exaggeration? _____.

8. Has the injury resulted in a permanent disability? _____ If so, what? _____* (Permanent disability, such as the loss of whole or parts, of fingers, etc., should be accurately marked on diagram) _____
9. For what period, from the date of accident, is disability likely to exist? _____ weeks _____ days.
10. Is injured able to attend to any part of his present or any other occupation? _____
11. State, in patient's own words, how accident occurred _____

12. Remarks, exceptional medical facts, or any other information which you may deem necessary in considering this case _____

Graduate of _____

Year _____

Attending Physician.

Date of this Report _____, 192____

*IMPORTANT: Exact point of amputation and other permanent partial disabilities MUST BE KNOWN BY THE COMMISSION in order to determine compensation due injured according to permanent partial disability schedule (Sec. 33, W. C. A.) in the law. Kindly DESCRIBE AND MARK DIAGRAMS ACCURATELY.

Form C-32

BEFORE THE INDUSTRIAL COMMISSION OF OHIO

In the Matter of the Claim of _____, of _____ } No._____ **APPLICATION FOR LUMP SUM AWARD**

The applicant herein, _____, represents that he has heretofore filed claim with THE INDUSTRIAL COMMISSION OF OHIO for an award from the State Insurance Fund; that said Commission has allowed and ordered paid to h____ from said Fund the sum of $_____; that pursuant to the rules of said Commission, said amount is being paid in bi-weekly installments.

Said applicant hereby requests that he be allowed a lump sum payment in the amount of $_____.

In support of this request, said applicant submits for the consideration of said Commission the following statement of facts: (Set out in full reasons for desiring a lump sum payment, what money is to be used for, etc.): ----------

Applicant

AFFIDAVIT

STATE OF OHIO, COUNTY OF ----------, ss.:
----------, being first duly sworn, says that the statements contained in the foregoing Application for Lump Sum Award are true.

Sworn to and subscribed before me, the undersigned authority, this------ day of ----------, 192----.

Section 1465-87 of the General Code of Ohio:

"The board (commission), under special circumstances, and when the same is deemed advisable, may commute periodical benefits to one or more lump sum payments."

Rule 20 of the Rules of Procedure of The Industrial Commission of Ohio:

"Payment of awards in lump sums will be made only when, in a supplemental proceeding, it is made to appear to the Commission that it would be to the mutual advantage of the applicant or beneficiaries and to the State Insurance Fund."

Form C-105

BEFORE THE INDUSTRIAL COMMISSION OF OHIO.

In the Matter of the Claim of

No.----------

AFFIDAVIT

State of Ohio }
} ss.
County of ---------- }

(Signature of Affiant)

Sworn to before me and subscribed in my presence this ---------- day of ----------, 192----

SYNOPSES OF AMERICAN WORKMEN'S COMPENSATION ACTS.

The following synopses of the American Workmen's Compensation Acts are reprinted from the Bulletin of the United States Bureau of Labor Statistics (No. 272, January 1921) supplemented and revised by the author, as to subsequent amendments as they appear in the reprints of the Acts and digests prepared and published by F. Robertson Jones of New York City.

Upon the theory that the practitioner will have available the act of his state and will only occasionally find it necessary to obtain general information in regard to the provisions of the acts of distant states, rather than specific information as to exact phraseology, it is hoped that these synopses will prove of sufficient practical value to warrant their insertion and at the same time obviate the necessity and the expense of adding another volume to this work, which could not be avoided if the complete text of the Acts, of each of the forty-three states and three territories, were to be included.

ALABAMA.

Date of Enactment.—August 23, 1919. Effective January 1, 1920.

Injuries compensated.—Injuries caused by accident arising out of and in the course of the employment, causing disability for more than two weeks, or death, not caused by employee's willful misconduct, intoxication, or willful failure to observe rules or statutory duties.

Industries covered.—All except those employing less than 16 persons, common carriers while engaged in interstate commerce and domestic and agricultural service. Municipalities and employers of less than 16 employees (except farm laborers), may elect to come under the act.

Persons compensated.—Private employment: All persons in the industries covered, including minors, but excepting casual employees. Public employment: Not covered unless employer elects.

Burden of payment.—Entire cost rests upon the employer.

Compensation for death:

(*a*) Burial expenses not to exceed $100.

(*b*) Total dependents: To widow, 30 per cent of wages; to dependent husband, 25 per cent; to widow or widower and one child, 40 per cent; to widow or widower and two or three children, 50 per cent; to widow or widower and four of more children, 60 per cent; to dependent orphan, 30 per cent; for each additional orphan, 10 35 per cent; to grand parent, brother, sister, mother-in-law, fath- per cent, maximum 60 per cent; to one parent, 25 per cent, both er-in-law, if one, 20 per cent, if more than one 25 per cent.

Compensation payable in the order named and ceases on death or remarriage, and upon arrival of children at age of 18.

(*c*) To partial dependents: A proportion of the above corresponding to the relation the contribution of the deceased to their support bore to his wages.

Maximum weekly payment, $12; minimum, $5. Total period, 300 weeks; total maximum $5,000.

Compensation for disability:

(*a*) Reasonable medical, etc., treatment for the first 60 days, not exceeding $100.

(*b*) For temporary total disability, 50 per cent of wages for not over 300 weeks.

(*c*) For partial disability, 50 per cent of wage loss for not over 300 weeks.

For certain specific injuries (mutilations, etc.), 50 per cent of wages for fixed periods (10 to 400 weeks).

(*d*) For permanent total disability, 50 per cent of wages for 550 weeks, not over $5 weekly after 400 weeks.

Maximum weekly payments, $12; with one wholly dependent child, $13; with two children $14; with three or more children, $15; minimum, $5.

No compensation payable for first two weeks. Compensation may be commuted to lump-sum payments by agreement or by the court.

Revision of benefits.—Awards payable for more than six months may be revised by agreement or by court.

Insurance.—Employers may insure whole or part of compensation. Insurance not required.

Security for payments.—Compensation is not assignable, nor subject to garnishment, and is entitled to the same preferences as unpaid wages.

Settlement of disputes.—Settlements not made by agreement are determined by the courts.

NOTICE OF INJURY AND CLAIM OR PROCEEDINGS FOR COMPENSATION

Written notice substantially in prescribed form must be served upon employer or his agent within 5 days after occurrence of injury. Notice deferred to 90 days, excused upon certain grounds. Claim must be made within one year after injury, death, last payment or removal of incapacity, (§§19-20a).

ALASKA.

Date of enactment.—April 29, 1915; in effect July 28, 1915; amended, chapter 44, acts of 1917.

Injuries compensated.—Personal injury causing disability for more than two weeks, or death, arising out of and in course of employment, not due

to the employee's willful intention to injure himself or another, or to his intoxication.

Industries covered.—Mining operations in which five or more persons are employed, unless election to the contrary is made (includes development and construction work, stamp and roller mills, reduction work and processes, coke ovens, etc.).

Persons compensated.—Private employment: All employees in industries covered, contractors and sub-contractors excluded. Public employment not included.

Burden of payment.—All on employer.

Compensation for death:

(*a*) If married $3,000 to widow, $600 additional for each child under 16 years of age, or child wholly dependent by reason of mental or physical incompetency, or unborn or posthumous child, and to dependent parent or parents if any; if no widow, $3,000 to any minor orphan, and $600 additional for each child under 16; no total to exceed $6,000.

(*b*) If unmarried, and dependent parent or parents, $1,200 to each.

(*c*) If no dependents, funeral expenses not to exceed $150, and other expenses, if any, to same amount.

Compensation for disability:

(*a*) Permanent total: $3,600 to workman alone; $1,200 additional if wife is living; $600 additional for each child under 16, posthumous child, or child over 16, dependent by reason of physical or mental incompetency; total not to exceed $6,000. If no wife or children, $600 to each dependent parent.

(*b*) Temporary total disability: 50 per cent of weekly wages for not over six months.

(*c*) Permanent partial disability: Fixed sums for specified injuries in lieu of other payments, varying with conjugal condition and number of children.

Revision of benefits.—Readjustment must be made if within two years an injury develops or proves to be such as to warrant a different award from any previously made.

Insurance.—No provision.

Security of payments.—Attachment may be had pending result of action, or employer may deposit cash or bond with court. Payments are exempt from execution.

Settlement of disputes.—By courts, either with or without jury trial.

NOTICE OF INJURY AND CLAIM OR PROCEEDINGS FOR COMPENSATION.

Any person claiming to be a beneficiary shall within 120 days after the employee's death serve the employer with notice of claim. (§9)

Any and all claims for compensation under this act shall be barred unless an action for the recovery of the same shall be commenced within two years after the cause of action shall have accrued, or, in the event of mental incapacity, within two years after the removal of such incapacity. (§26).

ACT OF ARIZONA.

Date of enactment.—June 8, 1912; in effect September 1, 1912; amended, chapter 7, acts of 1913; Act of 1921, chapter 103 declared unionstitutional leaving former act in effect. Indus. Comm. v. Crisman (Ariz.) 199 Pac. 390.

Injuries compensated.—All accidental injuries causing disability of at least two weeks, or death, arising out of and in the course of the employment, caused in whole or in part, or contributed to, by a necessary risk or danger of, or inherent in the nature of the employment, or by failure of the employer or his agents to exercise due care or to comply with any law affecting the employment. Employee has right to elect or reject act after injury.

Industries covered.—All especially dangerous employments (enumerated list), including the construction, operation, and maintenance of steam and street railroads; work with or near explosives; building work using iron or steel frames or hoists, derricks, or ladders or scaffolds 20 or more feet above ground; telegraph, telephone, or other electrical work; work in mines, quarries, tunnels, subways, etc.; work in mills, shops, and factories using power machinery. Elective as to other industries.

Persons compensated.—Private employment: All employees in industries covered. Public employment: No provision.

Burden of payment.—Entire cost rests upon the employer.

Compensation for death:

(*a*) To persons wholly dependent, a lump sum equal to 2,400 times one-half the daily wages or earnings of the deceased employee, but not to exceed $4,000. Payments to children cease on reaching the age of 18 years.

(*b*) If no dependents, the reasonable expenses of medical attendance and burial of deceased employee.

Compnsation for disability:

(*a*) For total disability, 50 per cent of the employee's semimonthly earnings during the time he is unable to work at any gainful occupation.

(*b*) For partial disability, a semimonthly payment equal to one-half the wage decrease.

(*c*) The total amount of payments for total or partial disability caused by a single injury not to exceed $4,000.

Revision of benefits.—Examinations as to the nature of injury and degree of incapacity, etc., may be required by either party at intervals of not less than three months.

Insurance.—The employer may insure provided the liability for compensation is not less than the compensation fixed by law.

Security of payments.—A judgment for compensation issued by a court is collectible without relief from valuation or appraisement laws and has the same preferential claim as is allowed by law for unpaid wages or personal services.

Settlement of disputes.—Disputes may be settled by (*a*) written agreement between the parties, (*b*) arbitration, or (*c*) reference to the attorney general of the State. In case of failure or refusal to agree by any of the modes above provided, then by a civil action at law.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Written notice within two weeks unless employee killed or incompetent. Must state name and address of workman, date and place of accident, cause thereof, nature and degree of injury, compensation claimed. Failure or defect no bar if employer not prejudiced. Section 3172.

CALIFORNIA.

Date of enactment.—April 8, 1911; in effect September 1, 1911; new act, chapter 176, acts of 1913, in effect January 1, 1914; new act, chapter 586, acts of 1917, in effect January 1, 1918; amended chapter 471, acts of 1919, effective July 22, 1919.

Injuries compensated.—Injuries or disease arising out of and in the course of employment, including injuries to artificial members, causing disability for more than 7 days, or death, not intentionally self inflicted and not the result of the intoxication of the injured employee.

Industries covered.—All except agriculture and domestic service, which services may come under the act by joint election.

Persons compensated.—Private employment: All employees including apprentices and aliens, excepting casual employees not in the course of the employer's trade or business. Public employment: Persons employed by the State and its political subdivisions and all public corporations, including officers and enlisted men of the National Guard.

Burden of payment.—Entire cost rests upon the employer.

Compensation for death:

(*a*) The reasonable expense of burial, not exceeding $100.

(*b*) To persons wholly dependent, three times the annual earnings of the deceased employee; not less than $1,000 nor more than $5,000 payable at least semimonthly in installments equal to 65 per cent of the wages. Payments to children cease on their reaching the age of 18 years, unless mentally or physically incapacitated for earning a living.

(*c*) If only partial dependents survive, three times the annual contribution of the deceased to their support, subject to the same limitations as above.

(*d*) If no dependents, burial expenses, and $350 to be paid to rehabilitation fund. Any disability payments made and burial expenses paid are to be considered as parts of the foregoing totals.

Compensation for disability:

(*a*) Such medical, surgical and hospital treatment as may reasonably be required to cure and relieve from effects of injury.

(*b*) For temporary total disability, 65 per cent of average weekly earnings during such disability.

(*c*) For temporary partial disability, 65 per cent of weekly loss of wages during such disability.

(*d*) For permanent disability, 65 per cent of average weekly earnings for periods varying from 4 to 240 weeks, according to the degree of disability. After the expiration of 240 weeks a further benefit varying from 10 to 40 per cent of the weekly earnings is payable during the remainder of life, when the degree of disability reaches or exceeds 70 per cent.

The aggregate amount of benefits for a single injury causing temporary disability is limited to three times the annual earnings of the injured person, with a maximum benefit period of 240 weeks.

In case of permanent incapacity or death, a lump sum may be substituted for benefits, such lump sum to equal the present value of the benefits computed at 6 per cent.

Average weekly earnings shall be considered as not less than $6.41 nor more than $32.05.

Revision of benefits.—Decisions and awards may be reviewed at any time during the first 245 weeks, after legal notice received.

Insurance.—Insurance required in the State insurance fund or in an authorized insurance company, unless the employer furnishes proof of ability to carry his own insurance. Municipalities are required to insure in the State fund unless the risk is refused.

Security of payments.—A claim for injury or death of an employee or any award shall have the same preference over other unsecured debts as is given by law to claims for wages, but not so as to impair a lien of a previous award. Policies inure directly to the benefit of employees, who also have a first lien on any amount due the employer from the insurance company. Self-insurers may be required to give bond or deposit securities.

Settlement of disputes.—Disputes are settled by the State industrial accident commission, subject to a limited review by the courts.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Written notice, giving prescribed particulars, must be served on employer within 30 days. Knowledge excuses notice. Want of or defect in notice does not bar claim if there was no intention to mislead and employer was not prejudiced (§15). Proceedings in case of disability must be begun within six months after injury; in case of death, within one year after

death and 240 weeks after injury. If payment has been agreed upon or made in part, claim may be made within six months after agreement or last payment. Proceedings for further disability caused by original injury must be begun within 245 weeks after injury (§11a, b, c). *Miller v. Ind. Acc. Comm.*, 156 *Pac.* 1033; *Northwestern Pacific R. Co. v. Ind. Acc. Comm.*, 161 *Pac.* 123; *Red River Lumber Co. v. Pillsbury, id.* 982; *Smith v. Ind. Acc. Comm.*, 162 *Pac.* 636; *U. S. Fidelity & Guaranty Co. v. Pillsbury, id.* 638; *Western Idemnity Co. v. Ind. Acc. Comm.*, 169 *Pac.* 663; *Employee's Credit Co. v. Ind. Acc. Comm., id.* 1001; *Head Drilling Co. v. Ind. Acc. Comm.*, 170 *Pac.* 157; *Fidelity & Casualty Co. of N. Y. v. Ind. Acc. Comm., id.* 1112; *Kemper v. Ind. Acc. Comm.*, 171 *Pac.* 426, *Kauffman v. Ind. Acc. Comm.*, 174 *Pac.* 690; *Leadbettor v. Ind. Acc. Comm.*, 177 *Pac.* 449.

COLORADO.

Date of enactment.—April 10, 1915; in effect August 1, 1915. Reenacted, chapter 210, acts of 1919. Effective May 1, 1919.

Injuries compensated.—Injuries caused by accident arising out of and in course of employment, not intentionally self inflicted, and causing death within two years or disability for more than ten days.

Industries covered.—All, except interstate commerce and domestic and agricultural labor, in which four or more persons are employed, if employers elect to come under the act; others may elect, but lose no defenses if they do not.

Persons compensated.—Private employment; All employees, including aliens and minors, whether lawfully or unlawfully employed, but excluding employees whose work is but casual and not in the usual course of the employer's business. Public employees: All under any appointment or contract of hire; elective officials and officers and enlisted men of the National Guard excluded.

Burden of payment.—All on employer.

Compensation for death:

(*a*) To persons wholly dependent, including acknowledged illegitimate children, 50 per cent of the weekly wages for six years, $10 maximum, $5 minimum, total not to exceed $3,125 nor to be less than $1,560. If death occurs from any cause during receipt of disability benefits, any unaccrued and unpaid remainder goes to dependents.

(*b*) If only partial dependents survive, 50 per cent of the weekly wages, $10 maximum, $5 minimum, for such part of six years as the commission may determine, total not to exceed $3,125. If death occurs from any cause during the receipt of disability benefits, partial dependents shall receive not more than four times the amount contributed by the deceased during his last year of employment, the aggregate of disability and death benefits not to exceed $3,125.

(*c*) If no dependents, medical services and $75 funeral expenses.

(*d*) Payments to any beneficiary cease on death; to widow or dependent widower on remarriage, but a lump sum equal to one-half the unpaid balance shall be paid to the spouse if there are no children; if there are dependent children, the unpaid balance is payable to them; to children, on reaching the age of 18, unless physically or mentally incapacitated from earning.

Payments lapsing for any reason go to surviving dependents, if any. Benefits to aliens are one-third the amounts payable to citizens, and may not exceed $1,041.66 in all.

Compensation for disability.

(*a*) Medical and surgical assistance for first 60 days, not more than $200 in value and $100 for dental services.

(*b*) For temporary total disability, 50 per cent of weekly wages during continuance, $5 minimum, $10 maximum; full wages if less than $5.

(*c*) For permanent total disability, 50 per cent of average weekly wages, maximum $10, minimum $5, for life.

(*d*) For permanent partial disability, 50 per cent of the weekly wage decrease, $10 maximum; total not to exceed $2,600. Special schedule for specified injuries, 50 per cent of weekly wages for periods ranging from 4 to 208 weeks, in addition to other payments. Facial disfigurements may also be compensated for in an amount not exceeding $500.

(*e*) For temporary partial disability, 50 per cent of wage loss during disability; maximum $10, minimum $5 weekly, aggregate maximum $1,300.

Payments may be commuted to a lump sum after six months.

Revision of benefits.—Awards may be reviewed after making, and may be appealed from within 20 days.

Insurance.—Insurance in State fund, stock, or mutual company, or proof of financial ability to make payments, is required. Public employees must be insured in the State fund.

Security of payments.—Insurers are primarily liable to a workman or his beneficiaries entitled to benefits; notice to employer is notice to insurer; insolvency of employer does not release insurer. Claims are not assignable, and payments are exempt from attachment or execution. Claims to have same preference as to lien as wages, but not limited as to amount.

Settlement of disputes.—Disputes are determined by the industrial commission with limited appeal to courts.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Notice of injury must be given to employer within two days of its occurrence unless employer or foreman, etc., has actual notice thereof. Employee loses one day's compensation for each day's failure to give such notice (§31).

Claim for compensation must be filed with the Commission within one year (or, in case of mentally incompetent or minor dependent, eighteen months) after accident or death. Claim may be filed on behalf of employee or dependents by any one, including the Commission or its agents, subject to ratification in writing within two years after accident or death. Disability beginning more than five years from date of accident is conclusively presumed not to be due to such accident (§§84-85).

CONNECTICUT.

Date of enactment.—May 29, 1913; in effect January 1, 1914; amended, chapter 228, acts of 1915; chapter 368, acts of 1917; chapter 284, acts of 1918; chapter 142, acts of 1919; sections amended in 1921 §§ 5388, 5341, 5360, 5351, 5352, 5347, 5350, 5360, 5346, 5380, effective Aug. 1, 1921.

Injuries compensated.—All injuries arising out of and in the course of employment, disability of more than 7 days, or death, except when injury is caused by willful and serious misconduct of the injured employee, or by his intoxication. Occupational diseases are included. No objection that injury cannot be traced to a definite occurrence.

Industries covered.—All industries in which five or more persons are employed, in absence of contrary election by employer.

Persons compensated.—Private employment: All employees of an employer accepting the act, in absence of contrary election, outworkers and casual employees who are employed otherwise than for the purpose of the employer's business excepted and members of the employer's family residing with him unless their salary is included in payroll. Public employment: Employees of the State and any public corporation within the State using the services of another for pay, irrespective of pensions.

Burden of payment.—Entire cost rests upon the employer.

Compensation for death:

(*a*) $100 for burial expenses.

(*b*) To persons wholly dependent, a weekly compensation equal to one-half the earnings of the deceased employee.

(*c*) If only partial dependents survive, a weekly compensation, determined according to the measure of dependence, not exceeding one-half the earnings of the deceased employee.

(*d*) Compensation shall in no case be more than $18 or less than $5 weekly, and shall not continue longer than 312 weeks.

A widow's or widower's dependence ceases with remarriage, and a child's upon reaching 18 years of age, unless physically or mentally incapacitated.

If a widow or dependent widower remarries or dies during the term of benefit payments, subsequent payments go to other dependents, if any.

Aliens receive only one-half of above compensation.

Compensation for disability:

(*a*) Reasonable medical and surgical aid, and hospital service limited to the amount it actually costs the hospital to render such service.

(*b*) For total disability, a weekly compensation equal to one-half the employee's earnings, not more than $18 or less than $5 weekly, or for longer than 520 weeks.

(*c*) For partial disability, a weekly compensation equal to one-half the wage loss, but not more than $18 per week, nor less than $5, or for longer than 520 weeks. For specified injuries causing permanent partial disability, one-half the average weekly earnings for fixed periods in lieu of all other payments. Injury to any portion of the body mentioned in specified schedule may be compensated for the proportionate loss of or loss of use.

Lump-sum payments may be approved by the commissioner, provided they equal the value of the compensations.

Revision of benefits.—Review may be had upon request of either party, whenever it shall appear to the compensation commissioner that the incapacity or the measure of dependence has changed. The commissioner retains control over awards during their whole period, with power to take proper action thereon at any time.

Insurance.—Approved schemes may be substituted, provided the benefits are equivalent to those provided by law. Insurance may be taken in approved stock or mutual companies or associations.

Security of payments.—Employer must furnish the insurance commissioner satisfactory proof of his solvency and financial ability to pay awards, file satisfactory security with the insurance commissioner, or insure in approved stock or mutual companies or associations. Payments are not assignable, are exempt from execution, and are entitled to the same preference as wage debts.

Settlement of disputes.—Disputes are to be settled by the compensation commissioners. Appeals from findings and awards of any commissioner may be made to the superior court of the county without cost to either party.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

SEC. 5347 (as amended by ch. 142, acts of 1919). Any employee who has sustained an injury in the course of his employment shall forthwith notify his employer, or some person representing him, of such injury; and on his failure to give such notice, the commissioner may reduce the award of compensation proportionately to any prejudice which he shall find the employer has sustained by reason of such failure; but the burden of proof with respect to such prejudice shall rest upon the employer.

SEC. 5360. No proceedings for compensation under the provisions of this chapter shall be maintained unless a written notice of claim for compensation is made within one year from the date of the injury, unless good cause for delay is shown when time may be extended to two years.

DELAWARE.

Date of enactment.—April 2, 1917; in effect January 1, 1918; amended, chapter 203, acts of 1919. Amendments effective March 20, 1919; amended in 1921 §§ 3193tt section 139a, 3193j section 103c, 3193h, section 101a, 3193h, section 101b-d, 3193tt-139a, 3193tt section 139a, 3193q section 110, 3193h section 101, effective Apr. 1, 1921.

Injuries compensated.—Injuries by accident arising out of and in course of employment, causing disabiltiy for more than 14 days, or death within one year, and not due to the employee's intoxication or willful negligence or intent to injure himself or another.

Industries covered.—All, except agriculture and domestic service, in which five or more persons are employed, unless contrary election is made.

Persons compensated.—Private employment: all persons under contract for hire for a valuable consideration except casual employees not in the regular course of the trade or business of the employer, and outworkers. Public employment: Not included.

Burden of payment.—All on the employer.

Compensation in case of death:

(*a*) Funeral expenses, not exceeding $100.

(*b*) To the widow or widower alone, 25 per cent of the wages of the deceased employee; if one child, 40 per cent, and 5 per cent for each additional child; not over 60 per cent in all. If one or two orphan children, 25 per cent, and 10 per cent for each additional child, the total not to exceed 60 per cent. If none of the foregoing, and a dependent parent or parents survive, 20 per cent; if no parents, to dependent brothers or sisters, 15 per cent for one, with 5 per cent for each additional, the total not to exceed 25 per cent. Aliens (widows and children only) receive one-half the above amounts.

Payments are for a period of 285 weeks, minus any disability benefits paid to the injured person prior to his death, but cease on the death of a beneficiary, the remarriage of a widow or widower, or on a child attaining the age of 16 years; but orphan children or those abandoned by the surviving parent continue to receive benefits until the age of 16, regardless of the limitation of 285 weeks. Shares lapsing are redistributed.

Wages used in computing death benefits shall be reckoned as not less than $10 nor more than $30 per week.

Compensation for disability:

(*a*) Medical and surgical aid as may be reasonably required during the first 30 days, additional treatment may be had upon petitioning board, unless refused by the employee, but not to exceed $100.

(*b*) For total disability, for the first 475 weeks, 50 per cent of the injured person's wages, not more than $15 nor less than $5 per week,

unless the wages were less than $5, when full wages shall be paid, the total not to exceed $4,000.

(c) For partial disability, 50 per cent of the wage loss, not more than $15 per week, for not more than 285 weeks; for specified injuries, 50 per cent of the wages for fixed periods, in lieu of all other payments, the amount to be not more than $15 nor less than $5, per week, unless the wages were less than $5, when the full wages shall be paid. 1921 amendment makes new provision for permanent injuries not specified.

Periodical payments may be commuted to lump sums on the application of either party, with due notice to the other.

Revision of benefits.—On application of any party in interest, but not oftener than once in six months, a review of awards may be had and changes made as the condition of the injured person or the status of beneficiaries may warrant.

Insurance.—Insurance is required in an approved organization, unless adequate proof of the employer's financial ability to meet obligations is furnished.

Self-insurers may be required to give bond or make a deposit to secure the payment of liabilities.

Security of payments.—Policies must inure directly to the benefit of the person entitled to compensation. Payments have the same priority as wage debts, and are not subject to assignment or execution.

Settlement of disputes.—Disputes are settled by the State industrial accident board, subject to appeal to the courts, to be tried without the aid of a jury.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Employer must have notice or knowledge of injury within 14 days, but if notice is given or knowledge obtained within 30 days, no want, failure or inaccuracy shall bar compensation unless employer is prejudiced thereby, and then only to extent of such prejudice; but if failure to give notice is due to mistake, etc., compensation is allowed, unless employer is prejudiced, and then reduced only to extent of such prejudice. If no knowledge or notice within 90 days, no compensation allowed (31931 §105). Claim must be filed within a year after injury, death or last payment, if any (3193v §115).

DISTRICT OF COLUMBIA.

Date of enactment.—July 11, 1919; in effect July 1, 1919.

This act extends the provisions of the act compensating civil employees of the United States to "employees of the government of the District of Columbia so far as they may be applicable," except pensionable members of the police and fire departments.

GEORGIA.

Date of enactment.—August 17, 1920; in effect March 1, 1921.

Injuries compensated.—Personal injuries by accident arising out of and in course of the employment, causing death or disability for more than 14 days, not due to the injured employee's willful misconduct, intoxication, violation of safety provisions, or the willful act of a third person not due to the employment.

Industries covered.—All where ten or more persons are employed, excepting agriculture and domestic service, common carriers using steam power, and institutions operated as public charities, all in the absence of contrary election. Small establishments may make election to come under the act.

Persons compensated.—Private employment: All employees in establishments covered, except casual employees. Public employment: Employees of municipal corporations and political subdivisions of the State.

Burden of payment.—All on employer.

Compensation for death:

(*a*) Burial expenses not to exceed $100.

(*b*) To persons wholly dependent, 50 per cent of the average weekly wages of the deceased employee.

(*c*) To persons partly dependent, a payment proportionate to the decedent's contribution to their support.

Payments continue for not over 300 weeks from the date of injury, $5 weekly minimum and $10 maximum, the total not to exceed $4,000. They cease on the remarriage of a widow or widower, or on a child reaching the age of 18 unless incapacitated for earning.

Compensation for disability:

(*a*) Necessary medical attention for not more than 30 days, the cost not to exceed $100.

(*b*) For total disability, one-half the weekly wages, not less than $6 nor more than $12, for not more than 350 weeks, the total not to exceed $4,000.

(*c*) For partial disability, 50 per cent of the wage loss, not more than $12 per week, for not more than 300 weeks; fixed periods for specified injuries, in lieu of all other compensation.

Any weekly payment may be commuted to a lump sum after 26 weeks if the parties agree and the commission approves.

Revision of benefits.—The commission may at any time review an award or agreement, either on its own motion or on application of either party.

Insurance—Insurance in a licensed stock or mutual company, or a reciprocal association is required unless satisfactory proof is given to act as a self-insurer.

Security of payments.—Evidence of insurance must be filed, policies must inure directly to beneficiaries, payments have same preference as wage debts, and are exempt from assignment, attachment, etc.

Settlement of disputes.—Disputes are settled by an industrial commission, subject to appeal to the courts.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Unless employer or his representative has knowledge thereof, written notice of accident must be given to employer immediately or as soon as practicable thereafter, otherwise, in absence of specified excuse, no compensation due for period prior to notice. Unless employer has knowledge or notice within thirty days after accident and also after death, if death results, no compensation is payable, unless excused by Commission and employer has not been prejudiced. Defect in notice does not bar compensation unless employer was prejudiced thereby and then only to the extent of such prejudice. Claim must be filed within a year after accident and, if death results, also within a year after death (§§23-25).

HAWAII.

Date of enactment.—April 28, 1915; in effect July 1, 1915; amended, act No. 227, acts of 1917. Amendments effective May 2, 1917.

Injuries compensated.—Personal injury by accident arising out of and in course of employment, including occupational diseases, causing disability for more than seven days or death within six months, and not due to the employee's intention to injure himself or another or to his intoxication.

Industries covered.—All public and all industrial employment for pecuniary gain.

Persons compensated.—Private employment: All persons under contract of employment or apprenticeship, other than casual employees, whose pay does not exceed $36 per week. Public employment: All except elective officials and employees who receive salaries in excess of $1,800 per year.

Burden of payment.—All on employer.

Compensation for death:

(*a*) $100 funeral expenses.

(*b*) 40 per cent of the average weekly wages to widow or dependent widower alone, 50 per cent if one or two dependent children, 60 per cent if three or more; 30 per cent to one or two orphans, 10 per cent additional for each child in excess of two, total not to exceed 50 per cent. If no consort or child, but other dependents, 25 to 40 per cent.

(*c*) Payments to widow cease on death or remarriage, and to widower on termination of disability or remarriage; to child on reaching age of 15, unless incapable of self-support, when they may continue to 18; to other beneficiaries, on termination of disability; no payments except to children to continue longer than 312 weeks. Basic wages not less than $5 nor more than $36 weekly.

Compensation for disability:

(*a*) Reasonable surgical, medical, and hospital services during disability, not exceeding $150 in amount.

(*b*) For total disability, 60 per cent of weekly wages, $3 minimum, $18 maximum, for not longer than 312 weeks; total not to exceed $5,000. If wages are less than $3, full wages will be paid unless disability is permanent, when $3, will be paid.

(*c*) For partial disability, 50 per cent of wage decrease, $12 maximum, not over 312 weeks, total not to exceed $5,000. Fixed awards are made in lieu of all other payments for specified injuries.

Payments may be commuted to one or more lump sums in any case.

Revision of benefits.—Agreements or awards may be reviewed at any time, but not oftener than once in six months.

Insurance.—Private employers must carry insurance, secure guaranty insurance, deposit security, or furnish proof of financial ability to make payments.

Security of payments.—Payments are preferred claims, the same as wage debts. Employees have direct recourse to insuring company; insolvency of employer does not release insurer.

Settlement of disputes.—Industrial accident boards for each county with aid of a committee of arbitration, if desired by either party; appeals to courts.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Written notice, giving certain particulars, must be served on employer as soon as practicable after injury. Want of notice, delay in giving same, or inaccuracy therein, does not bar compensation if employer has not been prejudiced thereby, or if he had knowledge of accident. Claim must be made within 3 months after injury or death. Notice may include claim (§§21-24).

IDAHO.

Date of enactment.—March 16, 1917; in effect January 1, 1918; amended 1921, sections 6216, 6223, 6230A, 6231, 6233, 6234, 6263, 6265, 6266, 6268, 6270A, 6271, 6272, 6272A, 6278, 6281, 6281A, 6287A, 6299, 6317A, 6317B, 6321, effective May 6, 1921.

Injuries compensated.—Injury by accident arising out of and in course of employment, not due to the employee's willful intention to injure himself or another or to his intoxication, causing death within two years, or disability for more than seven days.

Industries covered.—Compulsorily all public employment and all private employment carried on by the employer for pecuniary gain, except agricultural and domestic service and employment by charitable organizations. Exempted industries may come under the act by written agreement of both parties.

Persons compensated.—Private employment: All employees except casual, outworkers, and members of the employer's family dwelling in his house. Public employment: All except those receiving salaries in excess of $2,400 per annum and elected officials.

Burden of payment.—All on employer, but provision may be made for employees to contribute to a hospital fund.

Compensation for death:

(*a*) Burial expenses not to exceed $200.

(*b*) To a dependent widow or widower alone, 45 per cent of the employee's average weekly wages; if a child or children, 55 per cent. Orphan children receive 25 per cent if one, and 10 per cent additional for each child more than one, the total not to exceed 55 per cent. To a dependent parent or parents, any sum not paid to the foregoing, the total not to exceed 55 per cent of the weekly wages; or if none of the foregoing dependents, 25 per cent to one dependent parent or 20 per cent to each if both are dependent. Also other dependents may receive benefits within the 55 per cent limits, if any sum remains.

(*c*) If there are no dependents, the employer shall pay $1,000 into the industrial administration fund.

(*d*) No payment shall extend beyond 400 weeks, and shall terminate on the death or remarriage of a widow or widower, on a child reaching the age of 18 unless incapable of self-support, or on a parent or grand parent ceasing to be dependent. Benefits terminating before the end of 400 weeks may be reapportioned.

Death benefits may not exceed $12 per week nor be less than $6, or the actual weekly earnings if less than $6. Alien dependents receive only 50 per cent of the above compensation.

Compensation for disability:

(*a*) Reasonable medical, surgical, and hospital service, and crutches and apparatus as may be required or requested at the time of the injury and for a reasonable period thereafter. A bond of $5,000 is required of person agreeing to furnish medical attention.

(*b*) For total disability, 55 per cent of the injured person's wages, not less than $6 nor more than $12 for 400 weeks, and $6 per week thereafter. For temporary disability the benefits shall not exceed wages, but for permanent disability they shall not be less than $6. If employee has wife, 60 per cent of average weekly wage, maximum $13.10, minimum $6.55, for 400 weeks. 5 per cent additional for each child, maximum $16.

(*c*) For partial disability, 55 per cent of the wage loss for not more than 150 weeks, with a maximum limit the same as for total disability; schedule for designated permanent partial disabilities, ranging from 3 to 200 weeks, in addition to all other payments.

Lump-sum settlements may be approved for part or all the benefits, for either disability or death.

Revision of benefits.—Agreements or awards may be reviewed on the application of either party, but not oftener than once in six months.

Insurance.—Employers must insure in the State insurance fund or deposit satisfactory security or surety bond to guarantee payments.

Security of payments..—Policies of insurance in the State fund and all guaranty contracts must provide that the employee may have direct recourse thereto, and the insolvency of the employer is no release of his surety. Benefits have the same priority as wage payments, and are exempt from assignment, attachment, etc. Failure to insure subjects the employer to a fine of $500.

Settlement of disputes.—The act is administered by an industrial accident board. Agreements between employers and employees must be approved by this board. On failure to agree, a member of the board will hear and determine the question, whose award is valid unless a review by the board is requested within 30 days. A limited appeal from the findings of the board may be taken to the courts.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Written notice, giving certain particulars, must be served on employer as soon as practicable after injury. Want of notice, delay in giving same, or inaccuracy therein, does not bar compensation if employer has not been prejudiced thereby, or if he had knowledge of accident. Claim must be made within one year after injury or death. Notice may include claim (§§30-33).

ILLINOIS.

Date of enactment.—June 10, 1911; in effect May 1, 1912. New act, June 28, 1913; in effect July 1, 1913; amended June 28, 1915, May 31, June 25, 1917, June 28, 1919. Amendments effective July 1, 1919; amended 1921 sections 1d, section 3 paragraph 8, section 7 paragraph 2, section 8j3, section 12, section 14, section 19k, section 24, section 25b, effective July 1, 1921.

Injuries compensated.—Accidental injuries arising out of and in the course of employment causing permanent disfigurement, disability of over six working days, or death.

Industries covered.—Public employment; private employments (enumerated list), and all enterprises in which the law requires safety devices. Other ployers may elect, but forfeit no defenses if they do not.

Persons compensated.—Private employment: All employees except those not engaged in the usual trade, etc., of the employer. Public employment: All persons employed by the State, county, municipality, etc., except officials.

Burden of payment.—Entire cost rests on the employer.

Compensation for death:

(*a*) To persons wholly dependent, a sum equal to four year's earnings, not less than $1,650 (to a widow with one child under 16, $1,750

and if two or more children, $1,850), nor more than $3,500 (to a widow with one child under 16, $4,000, and if two or more children, $4,250.

(*b*) If only dependent collateral heirs survive, such percentage of the above sum as the support rendered during the last two years was of the earnings of the deceased.

(*c*) If no dependents, a burial benefit not exceeding $150.

(*d*) Where death occurs from injury before total payments equals death benefit and the employee leaves a widow, child, parent, grandparent or lineal heirs, the difference between the compensation for death and the sum of the payments made to the employee shall be paid to the beneficiaries, minimum $500.

Compensation for disability:

(*a*) Medical and surgical aid for not over eight weeks, and not over $200 in value; also necessary hospital, medical and surgical aid during the period for which compensation may be payable.

(*b*) For total disability beginnig with eighth day (second day if permanent), a weekly sum equal to 50 per cent of the employee's earnings, $7.50 minimum, $14 maximum, during disability or until payments equal a death benefit; thereafter, if the disability is permanent, a sum anually equal to 8 per cent of a death benefit, but not less than $10 per month.

(*c*) For permanent partial disability, 50 per cent of the loss of earning capacity, but not more than $14 per week.

(*d*) For certain specified injuries (mutilations, etc.,) a benefit of 50 per cent of weekly wages for fixed periods, in addition to temporary total disability payments.

(*e*) The basis of 50 per cent shall be increased 5 per cent for each child under 16 years of age, the maximum to be 65 per cent. The minimum sum of $7.50 per week is to be increased $1 for each such child, the total not to exceed $10.50. The maximum weekly payment of $14 is to be increased $1 per week for each such child, the total not to exceed $17.

(*f*) For serious and permanent disfigurement, not causing incapacity and not otherwise compensated, a sum not exceeding one-fourth the death benefits.

No payments are to extend beyond eight years, except in case of permanent total incapacity.

Lump-sum payments for either death of disability may be substituted by the industrial board for periodic payments.

Revision of benefits.—Medical examination may be had not oftened than every four weeks. The industrial board may, on request, review installment payments within 18 months after the award or agreement thereon.

Insurance.—The employer must insure, furnish proof of ability to pay, or make other provision for security of payment; or he may maintain a benefit system, but may not reduce his liability under the act.

Security of payments.—In case of insolvency, awards constitute liens upon all property of the employer within the county, paramount to all other claims, except wages, taxes, mortgages, or trust deeds. Exempt from garnishment, attachments or execution.

The rights of an insolvent employer to insurance indemnities are subrogated to injured employees.

Settlement of disputes.—Disputes are determined by the industrial commission through an arbitrator or arbitration committee, subject to review by the board. Questions of law may be reviewed by the courts.

NOTICE OF INJURY OR CLAIM FOR COMPENSATION.

The amended Act omits the provision formerly contained in §8d, that claim may be made within 18 months where partially disabled employee returns to the same employment.

INDIANA.

Date of enactment.—March 8, 1915; in effect September 1, 1915; amended, chapters 63, 81, 165, acts of 1917, chapters 57, 71, acts of 1919. Amendments effective May 15, 1919; chap. 169, acts of 1919; chap. 25, acts of 1921.

(a) Reasonable expenses not to exceed $100.

Injuries compensated.—Personal injury causing disability for more than seven days, or death within 300 weeks by accident arising out of and in course of employment, not due to willful misconduct, intention to injure self, intoxication, or willful failure or refusal to use safety appliance or perform duty required by statute.

Industries covered.—All except interstate and foreign commerce, for which Federal laws make provision, railroad employees engaged in train service, and domestic and agricultural labor, unless employer makes contrary election; compulsory as to state and its municipalities, and corporations engaged in mining coal.

Persons compensated.—Private employment: All employees and contractors' employees engaged upon the subject matter of the contract; employees whose work is casual and not in the usual course of the employer's business are excepted. Public employment: All employees.

Burden of payment.—All on employer.

Compensation for death:

(*a*) $100 for funeral expenses, if death from the injury occurs within 300 weeks.

(*b*) 50 per cent of weekly wages to persons wholly dependent; to those partially dependent, amounts proportionate to decedent's con-

tributions to their support. The term of payment is limited to 300 weeks from the receipt of the injury.

(*c*) Payments cease on remarriage of widow or dependent widower, or on children attaining the age of 18 years, unless mentally or physically disabled for earning. Wages are to be considered as not above $24 nor less than $10 weekly, no total to exceed $5,000.

Compensation for disability:

(*a*) Medical and hospital services for first 30 days, and longer at option of employer; industrial board may extend period 30 days; employees must accept unless otherwise ordered by industrial board.

(*b*) For total disability, 55 per cent of wages for not more than 500 weeks.

(*c*) For partial disability, 55 per cent of wage loss for not more than 300 weeks.

(*d*) For certain specified injuries, 55 per cent of wages for designated periods ranging from 10 to 250 weeks in lieu of all other payments; for permanent disfigurement impairing opportunity or usefulness, benefits for not over 200 weeks.

Wage basis and total amounts are limited as for death benefits.

In unusual cases payments may be commuted to a lump sum after 26 weeks.

Revision of benefits.—Awards may be reviewed at any time by industrial board on its own motion or the request of either party, but without retroactive effect.

Insurance.—Required unless satisfactory proof of financial ability to meet payments is furnished.

Security of payments.—Contracts of insurance must inure directly to the benefit of the person entitled to payments under an award. Payments have same preference and priority as unpaid wages, and are exempt from claims of creditors.

Settlement of disputes.—Disputes are determined by the industrial board, with appeal to courts on questions of law.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Notice of injury must be given to employer as soon as practicable thereafter, unless employer has knowledge thereof or other excusable grounds exist. If notice is not given, nor knowledge acquired, within 30 days, no compensation is payable until and from the date of notice or knowledge. Want of or defect in notice is no bar unless employer was prejudiced thereby, and then only to extent of prejudice. Claim must be filed within two years after injury or death (§§22-24). *Hornbrook-Price Co. v. Stewart,* 118*N. E.* 315; *Vandalia Coal Co. v. Holtz,* 120 *N. E.* 386; *Standard Cabinet Co. v. Landgrave,* 128 *N. E.* 358; *Garton v. Kleinknight, id.* 770; *Indian Creek Coal & Mining Co. v. Beach,* 127 *N. E.* 850.

IOWA.

Date of enactment.—April 18, 1913; in effect July 1, 1914. Amended, chapters 188, 270, 336, 409, 418, acts of 1917; chapter 220, acts of 1919, amendments effective July 4, 1919.

Injuries compensated.—All personal injuries arising out of and in the course of the employment causing disability for more than two weeks, or death, except when caused by the injured employee's willful intention to injure himself or another, or by the intoxication of the employee.

Industries covered.—All industries, except agriculture and domestic service, in absence of contrary election by employer. Compulsory as to the State and its municipalities.

Persons compensated.—Private employment: All employees in industries covered in absence of contrary election, except clerks not subjected to the hazards of the industry and causal employees, or those not employed for the purpose of the employer's trade or business. Public employment: All except policemen and firemen entitled to benefits from pension funds.

Burden of payment.—Entire burden is on employer.

Compensation for death:

(*a*) Reasonable expenses of the employee's last sickness and burial, not to exceed $100.

(*b*) To persons wholly dependent, a weekly payment equal to 60 per cent of the wages of the deceased employee, but not more than $15 nor less than $6 per week, for 300 weeks.

(*c*) If only partial dependents survive, such a proportion of the above as the amounts contributed by the employee to such partial dependents bear to his annual earnings.

(*d*) If the employee was a minor whose earnings were received by the parent, a sum to the parent equal to two-thirds of the amount provided for persons wholly dependent.

If the spouse dies during the compensation period, the unpaid balance goes to other dependents, if any; if she remarries, and there are no dependent children, payments cease.

Compensation for disability:

(*a*) Reasonable surgical, medical, and hospital services and supplies for first four weeks, not exceeding $100 and $100 additional in exceptional cases.

(*b*) For temporary total disability, 60 per cent of wages, not more than $15 nor less than $6 (unless wages are less than $6, then full wages), for not more than 300 weeks.

(*c*) For permanent total disability, the same compensation as for temporary disability, to be paid for a period of not more than 400 weeks.

(*d*) For permanent partial disability (specified maimings), 60 per cent of average weekly wages for fixed periods, beginning with the date of injury. Payments under (*b*) and (*c*) for the fifth, sixth

and seventh weeks are 100 per cent of the weekly earnings, if the disability continues during these periods respectively.

Lump-sum payments may be substituted in any case where the term can be determined, on approval of the industrial commissioner and an order by the court.

Revision of benefits.—Payments may be reviewed by the industrial commissioner at the request of either party.

Insurance.—Employers must insure in approved companies or mutual associations, or furnish satisfactory proof of financial ability to make payments, or deposit security with the State insurance department; or they may maintain approved substitute schemes, provided there is no diminution of benefits.

Security of payments.—In case of insolvency of the insurer a claim for compensation becomes a first lien, and in case of legal incapacity of insured to receive the amount due, the insured must settle directly with the beneficiary.

Settlement of disputes.—Disputes may be settled by committees of arbitration, with the industrial commissioner as chairman; limited appeal to courts.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

The employer must have notice or actual knowledge of the injury within fifteen days thereafter, but if notice is given or knowledge obtained within thirty days, no want, failure or inaccuracy shall bar compensation unless the employer is prejudiced thereby, and then only to the extent of such prejudice; but if failure of employee to give notice is due to mistake, etc., compensation is allowed, unless the employer is prejudiced, and then is reduced only to the extent of such prejudice. But if there is no knowledge or notice within ninety days, no compensation is allowed (§2477-m 8).

KANSAS.

Date of enactment.—March 14, 1911; in effect January 1, 1912; amended, chapter 216, acts of 1913; chapter 226, acts of 1917; chapter 222, acts of 1919.

Injuries compensated.—Injuries by accident arising out of and in the course of employment, not due to intoxication or deliberate intention of injured employee, or caused by his willful failure to use safeguards provided by statute or furnished by employer, causing incapacity to earn full wages for at least one week, or death.

Industries covered.—Railways, factories, quarries, electrical, building or engineering work, laundries, natural-gas plants, county and municipal work, employments requiring the use of dangerous, explosive, or inflamable materials, if employing five or more persons; and mines, without reference to the number of employees, all in absence of contrary election; employers in other industries and those employing less than five persons may also elect.

Persons compensated.—Private employment: All employees, including apprentices, but excluding those employed otherwise than for the purpose of

the employer's business. Public employment: Workmen on county and municipal work.

Burden of payment.—Entire cost rests upon the employer.

Compensation for death:

(*a*) To persons wholly dependent, a sum equal to three years' earnings of the deceased employee, not less than $1,400 nor more than $3,800. For nonresident alien beneficiaries (except in Canada) the maximum is $750.

(*b*) If only partial dependents survive, a sum proportionate to the injury to such dependents.

(*c*) If no dependents are left, a reasonable expense for burial, not exceeding $150. Compensation ceases upon the marriage of any dependent, or when a minor, not physically or mentally incapable of wage earning, shall become 18 years of age.

Compensation for disability:

(*a*) On demand, medical, surgical, and hospital treatment, not over $150 in value, for not more than 50 days.

(*b*) For total incapacity, payments during incapacity after the first week, equal to 60 per cent of earnings, but not less than $6 nor more than $15 per week.

(*c*) For partial incapacity, 60 per cent of wage loss during incapacity, after the first week. Lump sums equal to 50 per cent of the wages for specified periods are to be paid for designated injuries, in lieu of all other compensation.

No payments for total or partial disability shall extend over more than eight years.

After six months, lump-sum payments may be substituted at the employer's option, the sum to be agreed upon or determined by the court; or the workman may apply for a lump-sum settlement at any time.

Revision of benefits.—Any award may be modified at any time by agreement, or either party may demand a revision.

Insurance.—The employer may insure in any approved insurance scheme which provides compensation not less favorable than is provided in this act.

Security of payments.—Lump sums awarded by the court may be secured by order of the court by a good and sufficient bond when there is doubt of security of payment. If the employer was insured the insurer shall be subrogated to the rights and duties of the employer. Claims and awards are not assignable or subject to execution, etc.

Settlement of disputes.—Disputes not settled by agreement may be referred to arbitrators, subject to an appeal to courts.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Written notice stating prescribed particulars must be served on employer within ten days. Want of or defect in notice is no bar to compensation unless

employer is prejudiced thereby, or if occasioned by mistake or physical or mental incapacity. Claim must be made within three months after accident or termination of mental incapacity, or six months after death (§ 5916). *Roberts v. Wolff Packing Co.*, 149 Pac. 413; *Ackerson v. National Zinc Co.*, 153 *Pac.* 530; *Halverhout v. Southwestern Milling Co.*, 155 *Pac.* 916; *Gailey v. Peet Bros. Mfg. Co.*, 157 *Pac.* 431; *Knoll v. City of Salina, id.* 1167; *Sillix v. Armour & Co.*, 160 *Pac.* 1021.

KENTUCKY.

Date of enactment.—March 23, 1916; in effect August 1, 1916; amended, ch. 176, 1918; amended 1920.

Injuries compensated.—Personal injuries by accident arising out of and in course of employment, causing incapacity for more than seven days, or death within two years, not self-inflicted, or due to intoxication or willful misconduct. Results of pre-existing diseases are not included.

Industries covered.—All except domestic service and farm labor where three or more persons are employed; excepted industries may become subject to the act by joint application by employers and employees.

Persons compensated.—Private employment: All employees in establishments coming under the act, if the employees elect. Public employment: All employees of municipalities coming under the act, if the employees elect.

Burden of payment.—All on the employer.

Compensation for death:

(*a*) Reasonable burial expenses, not to exceed $75.

(*b*) To persons wholly dependent, 65 per cent of the average weekly earnings, not more than $12 nor less than $5 per week, for 335 weeks, the total not to exceed $4,000.

(*c*) If only partial dependents survive, a proportion of the amount for total dependency, determined by the degree of dependence.

(*d*) If no dependents, $100 payable to the personal representative.

Payments to a widow or widower cease on remarriage and to a child on reaching the age of 16, unless incapacitated for wage earning.

Payments thus terminated go to other beneficiaries, if any.

Compensation for disability:

(*a*) Medical, surgical, and hospital aid for 90 days, unless another period is fixed by the board, the cost may be $200 if the board shall so order.

(*b*) For total disability, 65 per cent of average weekly wages, not more than $15 nor less than $5, for eight years, total not to exceed $6,000.

(*c*) For partial disability, 65 per cent of the weekly wage loss, not to exceed $12, for not more than 335 weeks, total not to exceed $4,000.

Compensation periods are fixed for special injuries, in lieu of other payments.

Lump-sum awards may be made after six months if approved by the board.

Revision of benefits.—Review may be had on the request of either party or on the motion of the board, changing or revoking any previous order.

Insurance.—Employers accepting the act must insure in a stock or mutual company or the State Employees' Insurance Association, or give proof of financial ability to pay compensation direct.

Security of payments.—Insurance policies must provide for direct liability to the beneficiaries. Self-insurers must furnish bond or other security. Benefits have the same priority as wage debts and are not subject to assignment or attachment.

Settlement of disputes.—Disputes are settled by the workmen's compensation board, or a member thereof, or a referee appointed by it; limited appeal to courts.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Written notice, with certain particulars, must be given to employer as soon as practicable after accident. Defect in notice does not invalidate claim unless employer was misled to his injury. Want of notice or delay in giving same does not bar claim if occasioned by mistake or other reasonable cause, or if employer had knowledge of injury. Claim must be made within a year after accident, death or suspension of payments (§§ 23, 33-36).

LOUISIANA.

Date of enactment.—June 18, 1914; in effect January 1, 1915; amended, Nos. 38, 39, 1918; amended 1920, acts Nos. 234, 244, 247.

Injuries compensated.—Personal injury by accident arising out of and in course of employment causing disability for more than 2 weeks, or death within 1 year, and not due to willful intention to injure, to intoxication, to deliberate failure to use safeguards, or to deliberate breach of safety laws.

Industries covered.—Hazardous trades, businesses, or occupations in absence of contrary election; extensive list, and others may be so adjudged or brought within the act by voluntary agreement. Compulsory as to employees of the State and its municipalities and public boards. 1920 amended to include intrastate railway employees.

Persons compensated.—Private employment: Every person performing services arising out of and incidental to his employer's trade, business, or occupation, if the same is within the act. Public employment: Every person in the service of the State, etc., except officials.

Burden of payment.—All on employer.

Compensation for death:

(*a*) Reasonable expenses not to exceed $100.

(*b*) To widow or dependent widower alone, 30 per cent of weekly wages, 45 per cent if 1 child, and 60 per cent if 2 or more. If 1 child alone, 30 per cent, 45 per cent for 2, and 60 per cent for 3 or more. For 1 dependent parent, 25 per cent; for 2, 55 per cent; if 1 brother or sister, 30 per cent and 10 per cent additional for each other. The total in no case may exceed 60 per cent of the weekly wages, $3 minimum payment, $16 maximum, for not over 300 weeks. Payment to any beneficiary ceases on death or marriage, to children on reaching the age of 18, unless mentally or physically incapacitated. Act. No. 247, 1920. Where there is only 1 dependent widow, widower, child, or parent then dependent brothers, sisters or other members of the family may receive support at the rate of 10 per cent each, the total not to exceed 60 per cent.

Compensation for disability:

(*a*) Reasonable medical, surgical, and hospital services, not to exceed $150 in value.

(*b*) For total disability, 60 per cent of the weekly wages, $16 maximum, $3 minimum, unless the wages are less than $3, then full wages, for not more than 400 weeks.

(*c*) For partial disability, 60 per cent of the wage loss, for not more than 300 weeks.

(*d*) Fixed schedule for specified injuries, for periods from 10 to 200 weeks, in lieu of other payments. Payments in any case may be commuted to a lump sum on agreement of the parties and approval by the courts.

Revision of benefits.—Judgments may be modified at any time by agreement of the parties and approval by the courts; or after 1 year, they may be reviewed by the court on application of either party.

Insurance.—Required and double liability is the penalty for failure.

Security of payments.—Policy of insurance must give claimants right to direct payment regardless of the default or bankruptcy of the employer. Compensation payments have the same preference as wage debts.

Settlement of disputes.—Disputes are settled by judges of the courts in simple, summary procedure.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Notice of injury must be given to employer within six months after injury or death. Employer must post placard warning employees of notice required, otherwise period of limitation for notice is doubled. Actual knowledge excuses notice. Failure or inaccuracy of notice is no bar to compensation unless employer was prejudiced thereby (§§11-15). Settlement must be reached, or proceedings begun, within a year after injury or death, or last payment, if any, otherwise the claim is barred (§31.) *Boyer v. Crescent Paper Box Factory*, 78 *So.* 596.

MAINE.

Date of enactment.—April 1, 1915; in effect January 1, 1916; reenacted April 4, 1919; amendments effective July 2, 1919; amended 1921, sections 1, 7, 9, 12-16, 14, 26, 33, 29, 30, effective July 8, 1921.

Injuries compensated.—Injury sustained in course of employment, causing disability for more than 7 days, or death, not due to willful intention to injure himself or another, and not due to intoxication unless fact or habit of intoxication was known or cognizable to employer.

Industries covered.—All except agricultural and domestic labor, logging, and seamen in interstate or foreign commerce, in which more than five persons are employed, if employer elects. Abrogation of defenses does not affect cutting, hauling, driving, or rafting of logs.

Persons compensated.—Private employment: All persons in industries covered employees whose work is causal or not in the usual course of the employer's business excepted. Public employment: Employees of the State, cities, and counties, and of towns accepting the provisions of the act, other than officials; but cities and towns may continue injured firemen on the pay roll at full pay, in lieu of compensation.

Burden of payment.—All on employer. If employees contribute to substitute scheme, additional proportionate benefits must be paid.

Compensation for death:

(*a*) To persons wholly dependent, 66⅔ per cent of weekly wages for 300 weeks, $6 minimum, $16 maximum, not over $4,000 in all.

(*b*) If only partial dependents survive, amounts proportionate to the relation of the contribution paid by deceased, and his average wage, for 300 weeks.

(*c*) If no dependents, not above $200 expenses of last sickness and burial. Payments to children cease at age of 18 unless mentally or physically incapacitated for earning a living.

Compensation for disability:

(*a*) Reasonable medical and hospital service during first 30 days of disability, not over $100 in value, unless by agreement or order of commission a longer period or larger amount is provided for.

(*b*) For total disability, 66⅔ per cent of the wages for not more than 500 weeks, $6 minimum, $16 maximum, total not to exceed $6,000.

(*c*) For partial disability, 66⅔ per cent of the weekly wage loss, not over $16, for not more than 300 weeks. For specified injuries causing permanent partial disability, 66⅔ per cent of the wages for various fixed periods, then compensation at usual rate, for not more than 300 weeks in all.

Lump-sum payments may be approved by the commission after weekly payments for not less than six months.

Revision of benefits.—Agreements or awards may be reviewed at the instance of either party at any time within two years.

Insurance.—Insurance in approved companies is required unless the employer gives satisfactory proof of solvency and makes deposit or bond to secure payments.

Security of payments.—Claims have same preference over unsecured debts as do wages for labor.

Settlement of disputes.—Disputes are to be settled by the industrial accident commission, with appeal to courts on questions of law.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Written notice, giving certain particulars, must be served on employer within thirty days after accident. Defect in notice is no bar to recovery unless employer is misled thereby. Failure to give notice excused if due to accident, mistake, etc., or if employer had knowledge of injury. Claim must be filed within one year (§§17-20). Claim barred if agreement or petition is not filed within two years after injury, death or removal of incapacity (§39). *Simmon's Case,* 103 *Atl.* 68.

MARYLAND.

Date of enactment.—April 16, 1914; in effect November 1, 1914; amended, special session, chapter 6, 1917, chapters 86, 368, 379, 597, 713, acts of 1916; chapter 456 acts of 1920.

Injuries compensated.—Accidental personal injury arising out of and in course of employment, not due to willful intention or intoxication, and causing disability for more than three days or death within two years.

Industries covered.—Extrahazardous (enumerated list); others by joint election of employers and employees. Farm and domestic labor, country blacksmiths and wheelwrights are excluded.

Persons compensated.—Private employment: All industries covered, except causal employees and those receiving more than $2,000 annually. Public employment: Workmen employed for wages in extrahazardous work, unless the municipality makes other equal or better provision.

Burden of payment.—All on employer.

Compensation for death:

(*a*) Funeral expenses, not over $125.

(*b*) To persons wholly dependent, 66 2/3 per cent of the weekly wages for eight years; not more than $5,000 nor less than $1,000.

(*c*) To persons partly dependent, 66 2/3 per cent of the weekly wages for such portion of eight years as the commission may fix, the amount not to exceed $3,000.

(*d*) If no dependents, funeral expenses only.

(*e*) Payments to widow ceases on remarriage, and to children on reaching the age of 16 years, unless mentally or physically incapacitated.

Compensation for disability:

(*a*) Medical, surgical, artificial limbs etc., expenses, not above $300 in value.

(b) For total disability, 66⅔ per cent of weekly wages, $5 minimum, $18 maximum, during its continuance, total not to exceed $5,000. If wages are less than $5, full wages will be paid.

(c) For partial disability, 66⅔ per cent of weekly wage loss, $18 maximum, total not over $3,500; specific periods for specified maimings, in lieu of other payments.

Where the injured employee is a learner, with prospect of increase of wages, this fact may be considered in fixing awards.

Payments may, in the discretion of the commission, be made in part or in whole in lump sums.

Revision of benefits.—The commission may modify its findings and orders at any time for justifiable cause.

Insurance.—Insurance in State fund, stock or mutual company, or proof of financial ability, is required.

Security of payments.—Policies must permit action by commission to secure payments to any person entitled. Payments may not be assigned, nor are they subject to execution or attachment.

Settlement of disputes.—Disputes are to be settled by the industrial accident commission, with appeal to courts.

NOTICE OF INJURY AND CLAIM OR PROCEEDINGS FOR COMPENSATION.

Written notice of injury must be given to employer within 10 days after accident, and also, in case death results, within 30 days after death. Failure to give notice is no bar to compensation if excused by Commission on the ground that notice could not have been given or that employer or State Fund was not prejudiced thereby (§38). Claim must be filed with Commission within 30 days after beginning of disability, or, in case of death, within a year from date of death (§39; and cf. §62).

MASSACHUSETTS.

Date of enactment.—July 28, 1911; in effect, July 1, 1912; amended, chapters 571, acts of 1912; 48, 448, 568, 696, 746, acts of 1913; 338, 708, acts of 1914; 123, 275, 314, acts of 1915; 72, 90, acts of 1916; 198, 249, 269, acts of 1917; 113, 119, acts of 1918; chapters 197, 198, 204, 205, 226, 272, 299, acts of 1919; acts of 1920; amended 1921, section 45, affective July 25, 1921.

Injuries compensated.—Injuries arising out of and in the course of employment causing incapacity for 10 days, or death, unless the injury is due to the serious and willful misconduct of the injured employee.

Industries covered.—All industries except farm labor and domestic service. Exempted employments may come under the act if the employer so elects.

Persons compensated.—Private employment: All employees, except masters of vessels and seamen engaged in interstate or foreign commerce and

employees whose work is not in the usual course of the employer's business, where the employer is an insurer under this act. Public employment: The State shall, and any county, city, town, or district having powers of taxation and accepting the act may, compensate its laborers, workmen, and mechanics.

Burden of Payment.—Entire cost rests upon the employer.

Compensation for death:

(*a*) The reasonable expense of burial, not exceeding $100. If dependents survive, this sum shall be deducted from the compensation payable.

(*b*) To persons wholly dependent, a weekly payment equal to two thirds the average weekly wages of the deceased employee, but not less than $4 nor more than $10, for a period of 500 weeks, the total not to exceed $4,000.

(*c*) If only partial dependents survive, a sum proportionate to the portion of earnings contributed to their support by the deceased employee. Children cease to be dependents at 18 (16 if living apart from parent legally bound to render support), unless mentally or physically incapacitated from earning a living.

Compensation for disability:

(*a*) Reasonable medical and hospital services, and medicines as needed, for the first two weeks after injury, and in unusual cases for a longer period, in the discretion of the board.

Amendment of 1920 authorizes the allowance of cost of artificial limbs, eyes and other mechanical devices if in the opinion of the board such appliances would promote the employee's restoration to industry.

(*b*) For total disability, a sum equal to two-thirds the average weekly wages, but not less than $7 nor more than $16 per week, not exceeding 500 weeks, nor $4,000 in amount.

(*c*) For partial disability, two-thirds the wage loss, but not to exceed $16 per week, nor $4,000 in amount.

(*d*) In specified injuries (mutilations, etc.) two-thirds the weekly wages, not exceeding $10 nor less than $4 per week, for fixed periods, in addition to other compensation.

Lump-sum payments may be substituted in whole or part, after payments for injury or death have been made for not less than six months.

Revision of benefits.—Either party may demand a revision of payment at any time.

Insurance.—Employers under the act must subscribe to the State employees' insurance association or insure in some authorized company.

Security of payments.—Payments are not subject to assignment, attachment, or execution.

Settlement of disputes.—Disputes are decided primarily by a member of the industrial accident board, whose decision is subject to review by the board, with limited appeal to the courts.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Want of notice not a bar to proceedings if insurer not prejudiced thereby. (Pt. II, Sec. 18) Failure to make a claim within the period prescribed by Sec. 15, not a bar to proceedings if insurer was not prejudiced by the delay. (Pt. II, Sec. 23.)

MICHIGAN.

Date of enactment.—March 20, 1912; in effect September 1, 1912; amended, Nos. 50, 79, 156, 259, acts of 1913; Nos. 104, 153, 170, 171, acts of 1915; Nos. 41, 206, 235, 249, acts of 1917; Nos. 64, 110, acts of 1919; amended 1921, sections, Pt. 1, sec. 7; Pt. 3, sec. 19; Pt. 2, sec. 9; Pt. 2, sec. 8; Pt. 3, secs. 6-7; Pt. 3, sec. 14; Pt. 3, sec. 11; Pt. 1, sec. 10; Pt. 2, sec. 20; Pt. 3, sec. 10; Pt. 4, sec. 14, effective July 29, 1921.

Injuries compensated.—Injuries causing incapacity to earn full wages for a period of one week, or death, arising out of and in the course of employment, unless such injuries resulted from intentional and willful misconduct of the injured person.

Industires covered.—Compulsory as to the State and its municipalities, and each incorporated public board and commission authorized to hold property and to sue and be sued. All industries having one or more persons in service under contract of hire if the employer elects.

Persons compensated.—Private employment: All employees, including aliens and minors legally permitted to work. Public employment: All employees except officials of the State or of a municipality, elected at the polls.

Burden of payment.—Entire cost rests upon the employer.

Compensation for death:

(*a*) To persons wholly dependent, a weekly payment equal to 60 per cent of the deceased workman's average weekly wages, but not less than $7 nor more than $14 per week for a period of 300 weeks.

(*b*) If only partial dependents survive, such proportion of the above as the amount of previous contributions bears to such earnings.

(*c*) The reasonable expense of the last sickness and burial, not exceeding $200 in addition to any medical services.

Payments to children cease at 16, unless mentally or physically incapacitated from earning.

Compensation for disability:

(*a*) Reasonable medical and hospital services for the first 90 days after injury.

(*b*) For total incapacity, a weekly payment equal to 60 per cent of the earnings, but not less than $7 nor more than $14 per week, nor for a period longer than 500 weeks from the date of the injury, and not exceeding $7,000.

(*c*) For partial incapacity, a weekly payment equal to 60 per cent of the wage loss, but not more than $14 per week, and for not longer than 500 weeks.

(*d*) For certain specified injuries (mutilations, etc.), 60 per cent of the average weekly earnings for fixed periods, in lieu of other payments.

Payments begin with the eighth day after the injury, but if the disability continues for six weeks or longer, compensation is computed from the date of injury.

After six months lump sums may be substituted for weekly payments.

Revision of benefits.—Weekly payments may be reviewed by a member of the commission at the request of either party.

Insurance.—Employer must furnish proof of financial ability to pay the required compensation, or insure in an authorized employers' liability company, or in an employers' insurance association organized under State laws, or become a member of a State insurance fund administered by the State commissioner of insurance.

Security of payments.—In case of insolvency, claims constitute a first lien upon all property of the employer. Employers must furnish proof of financial ability to pay compensation, or insure in approved companies or with the State.

Settlement of disputes.—Either party may request the industrial accident board to appoint a member of the commission, whose decisions are subject to review by the board. The supreme court may review questions of law.

3. NOTICE OF INJURY, ETC.

The following provisions are new: Where disability does not develop within 6 months after injury, but does subsequently develop and where employer has notice of injury within three months after occurrence, claim for compensation may be made within three months after disability develops, but not more than two years after injury. Time limitation does not run against employee while he is prevented by physical or mental incapacity from making claim, or during employer's failure to report accident if he has knowledge thereof within three months thereafter. (Pt. II, §15).

MINNESOTA.

Date of enactment.—April 24, 1913; in effect October 1, 1913; amended, chapters 193, 209, acts of 1915; chapters 302, 351, acts of 1917; chapters 176, 185, 354, 356, 358, 363, 367, 416, 439, 442, 508, acts of 1919, and chapter 44, review by the board. The supreme court may review questions of law.
special session, 1919. Amended, Laws of 1921, ch. 82; Laws of 1921, ch. 26, ch. 423, Laws of 1921, effective Feb. 11 and April 21, 1921.

Injuries compensated.—Injury by accident arising out of and in the course of employment causing disability for more than one week, or death, unless intentionally caused, or due to the intoxication of the injured person.

Industries covered.—All excepting common carriers by steam railroad and farm and domestic service, in the absence of contrary election by employers.

Persons compensated.—Private employment: All employees, including aliens and minors lawfully employed, in the absence of contrary election, employees whose work is casual and not in the usual course of the employer's business excepted. Public employment: Included, except employees of State, those elected or appointed for regular terms, and employees of cities whose charters provide for compensation.

Burden of payment.—Cost rests upon the employer, except that upon agreement with employee contributions may be required.

Compensation for death:

(*a*) $150 funeral expenses.

(*b*) To a widow alone, 40 per cent of monthly wages of deceased, increasing to 66 2/3 per cent if four or more children; to a dependent husband alone, 30 per cent; to a dependent orphan, 45 per cent, with 10 per cent additional for each additional orphan, with a maximum of 66 2/3 per cent; if none of the above, 35 per cent to one parent and 45 per cent if both survive; if none of the foregoing, to other relatives wholly dependent, if but one, 30 per cent, or if more than one, 35 per cent, divided equally. Maximum $7,500.

Widows, on remarriage, receive in lump sum one-half the unpaid compensation.

(*c*) If only partial dependents survive, that portion of benefits provided for actual dependents which contributions bore to wages earned.

(*d*) When no dependents are left, expense of last sickness and burial and $100 to State treasurer.

Maximum weekly compensation $18, minimum $8.

Payments continue for not over 300 weeks, and cease when a child reaches the age of 18, unless physically or mentally incapacitated, and upon the death or marriage of other dependents unless otherwise specified, and where there are no children, on remarriage widow is entitled to lump sum.

Compensation for disability:

(*a*) Reasonable medical and surgical treatment, not exceeding 90 days nor $100 in value, unless ordered in exceptional cases, when $200 is the limit.

(*b*) For temporary total disability, 66 2/3 per cent of wages for not over 300 weeks.

(*c*) For permanent total disability, 66 2/3 per cent of the wages, maximum $10,000.

(*d*) For temporary partial disability, 66 2/3 per cent of wage loss, not over 300 weeks.

(*e*) For specified permanent partial disability (mutilations, etc.), 66 2/3 per cent of the earnings for fixed periods, in lieu of other payments, maximum of 400 weeks; for other permanent partial disabilities, not over 300 weeks.

Payments for disability may not be more than $18, nor may they be less than $8, unless the wages were less than $6.50 then full wages.

Lump sums must be substituted for periodical payments, but in case of death, permanent total disability, or certain maimings, the consent of the court must be obtained.

Revision of benefits.—After six months from the date of an award either party may apply to the court for revision.

Insurance.—Employers may insure in any authorized company, stock or mutual, or maintain cooperative schemes, assuming other and greater risks.

Security and payments.—Insured workmen have an equitable lien upon any policy becoming due, and in case of the employer's incapacity the insurer shall make payment directly to them. Claims have same preference as unpaid wages.

Settlement of disputes.—By judge of district court, in a summary manner, subject to review by the supreme court as to questions of law.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Written notice, substantially in prescribed form, must be served upon employer or his agent within 14 days after occurrence of injury, unless he has actual knowledge thereof. Defective notice, or notice deferred for 30 or 90 days, excused upon certain grounds. Proceedings must be begun within two years after employer's report of injury or removal of claimant's incapacity; in case of claim by dependent, within two years after recepit by Commission of employer's written notice of death (§§20-22). *State v. District Court, etc.*, 152 *N. W.* 838; *State ex rel. City of Northfield v. District Court of Rice County*, 155 *N. W.* 103; *State ex rel. Crookston Lumber Co. v. District Court of Pennington County*, 156 *N. W.* 278; *State v. Gen. Accident, Fire & Life Ins. Corpn.*, 158 *N. W.* 715; *State ex rel. Berwind Fuel Co. v. District Court of St. Louis County*, 164 *N. W.* 812; *Kraker v. Nett*, 180 *N. W.* 1014.

MISSOURI.

Date of enactment.—April 28, 1919; defeated by referendum; Re-enacted with amendments March 28, 1921. [Deferred by referendum.]

Injuries compensated.—Injuries by accident arising out of and in course of employment causing disability for more than seven days, or death within 350 weeks, unless due to employee's intentional self-inflicted injury.

Industries covered.—All where employer has five or more employees, except farm labor, domestic servants and public employments such as the State and its political subdivisions. Employers not included may elect to accept act.

Persons compensated.—Private employment: All employees in industries covered, including minors but excluding casual employees not engaged in the usual business of the employer, outworkers and employees of political subdivisions and those who reject act.

Burden of payment.—Entire cost rests upon the employer.

Compensation for death:

(*a*) Burial expenses not to exceed $150 and if not otherwise covered, $250 for expenses of last sickness.

(*b*) To total dependents, two-thirds of average annual earnings for not to exceed 300 weeks. Payments for more than one dependent child to be divided in the discretion of the commission. If more than one person is dependent the compensation is to be divided equally.

(*c*) To partial dependents according to the facts but only when there are no total dependents.

The maximum weekly payment is to be $20 and minimum $6.

Payments to children cease at 17, unless physically or mentally incapacitated.

Compensation for disability:

(*a*) Such medical, surgical and hospital, etc., treatment as may be reasonably required for first eight weeks, not exceeding $250 in value.

(*b*) For temporary total disability, two-thirds of wages for not over 400 weeks.

(*c*) For temporary partial disability, two-thirds of wage loss, for not over 200 weeks.

((*d*) For permanent partial disability, two-thirds of wages for periods fixed by the commission, but not in excess of 400 weeks; for certain specific injuries (mutilations, etc.), two-thirds of wages for fixed periods, in addition to all other compensation; for disfigurement in an amount not to exceed $750.

(*e*) For permanent total disability, two-thirds of wages for 240 weeks, and thereafter for life on basis of 50 per cent of wages.

Except where otherwise limited the maximum weekly payment is $20 per week and the minimum $6.

No compensation is payable for the first seven days after the injury unless disability continues for more than six weeks.

The commission may commute the compensation by the payment of a lump sum.

Revision of benefits.—Readjustment of compensation may be made by the commission on its own motion or on application.

Insurance.—An employer under the act must insure his liability for compensation in State fund or an authorized insurance company or furnish proof of ability to carry own liability.

Security of payments.—Compensation is not assignable, and is exempt from attachment, garnishment, and execution, and from set-off or counter claim, or any liability for any debt, and is entitled to the same preference as claims for wages without limit as to time or amount.

Settlement of disputes.—Disputes are decided primarily by the Missouri Workmen's Compensation Commission, with right of appeal to the circuit court on questions of law.

NOTICE OF INJURY AND CLAIM OR PROCEEDINGS FOR COMPENSATION.

Written notice must be given to employer as soon as practicable after the happening of the injury, unless excused by Commission for good cause. Defect or inaccuracy does not invalidate notice unless employer is prejudiced thereby. Claim must be filed within six months after injury, death or last payment, if any (§§38-39).

MONTANA.

Date of enactment.—March 8, 1915; in effect July 1, 1915; amended chapters 95, 100, acts of 1919; amended 1921, sections 2a, 3e, 16i, e, g, f, 40b, 40k, effective May 1 and July 1, 1921.

Injuries compensated.—Injuries arising out of and in course of employment, resulting from some fortuitous event, causing death, or disability for more than two weeks.

Industries covered.—"All inherently hazardous works and occupations," in which employers elect, including manufacturers, construction work, transportation, and repair of the means thereof but not including agricultural or domestic labor; compulsory as to public employment.

Persons compensated.—Private employment: All persons other than independent contractors, employed in the industries covered, whether as manual laborers or otherwise, except casual employees whose work is not in the usual course of the employer's business. Public employment: All employees in the industries covered.

Burden of payment.—All on employer; employees may contribute to hospital fund.

Compensation for death:

(a) $125 for funeral expenses if death occurs within six months of injury.

(b) To beneficiaries widow, widower, child or children, under 16, or invalid child above 16, 50 per cent of wages of the deceased if residents of the United States; if not, 25 per cent, unless other-

wise required by treaty. To major dependents (father or mother), in case there are no beneficiaries, 40 per cent. To minor dependents (brothers or sisters actually dependent), if no beneficiary or major dependent, 30 per cent. Nonresident alien dependents receive nothing unless required by treaty, nor do beneficiaries if citizens of a Government excluding citizens of the United States from equal benefits under compensation laws; not over 50 per cent of above rates in any case. Term of payment may not exceed 400 weeks, $12.50 maximum, $6 minimum; if wages less than $6, then full wages. Payments cease on remarriage of widow or widower, or when child, brother, or sister reaches the age of 16, unless an invalid.

Compensation for disability:

(*a*) Medical and hospital services during first two weeks after happening of injury, not over $100 in value, unless there is a hospital contract.

(*b*) For temporary total disability, 50 per cent of wages during disability, $12.50 maximum, $6 minimum, unless wages are less than $6, when full wages will be paid, for not more than 300 weeks.

(c) For permanent total disability, same scale as above for 400 weeks then $5 per week while disability continues.

(*d*) For partial disability, 50 per cent of the wage loss, not over $6.25 per week, nor 75 per cent of the compensation provided for loss of the injured member; payments to continue not more than 150 weeks for permanent cases, and 50 weeks if temporary.

(*e*) For specified maimings, 50 per cent of wages but not more than $12.50 per week nor less than $6 per week unless wages are less, then full wages.

Periodical payments may be converted in whole or in part to lump sums.

Revision of benefits.—Decisions and awards may be rescinded or amended at any time by the industrial accident board for good cause.

Insurance.—The employer may carry his own risk on a showing of financial ability; security may be required for probable liabilities and must be given when a continuing payment is ascertained. Insurance may be carried in any company authorized to do business in the State, or the employer may contribute to a State fund.

Security of payments.—In case of bankruptcy, etc., liabilities under this act are a first lien upon any deposit made by an employer, and if this is not sufficient, then on any property of the employer or insurer within the State, and shall be prorated with other lienable claims.

Settlement of disputes.—By industrial accident board, with limited appeal to courts.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION

No claims to recover compensation under this act for injuries not resulting in death shall be maintained unless, within sixty days after the occurrence of the accident which is claimed to have caused the injury, notice in writing, stating the name and address of the person injured, the time and and the place where the accident occurred, and the nature of the injury, and signed by the person injured, or some one in his behalf shall be served upon the employer or the insurer: *Provided, however,* That actual knowledge of such accident and injury on the part of such employer or his managing agent or superintendent in charge of the work upon which the injured employee was engaged at the time of the injury shall be equivalent to such service.

SEC. 10 (as amended by chapter 100, acts of 1919). (a) In case of personal injury or death all claims shall be forever barred unless presented in writing under oath to the employer, the insurer, or the board, as the case may be, within six months from the date of the happening of the accident, either by the claimant or someone legally authorized to act for him in his behalf.

NEBRASKA.

Date of enactment.—April 21, 1913; in effect December 1, 1914. [Deferred by referendum.] Amended, chapter 85, acts of 1917; chapter 91, acts of 1919; Amended 1921, §§ 3656 section 106, 3662 section 112 [3], 3661 section 111, 3665 section 115, 3680 section 130, 3682 section 132, 3683 section 132, 3681 section 131, 3687 section 137; chap. 190, Laws of 1919 title V art. XIII, § 24 as added by chap. 306 laws of 1921; effective July 28, 1921.

Injuries compensated.—Injury causing disability for more than seven days or death, caused by accident arising out of and in the course of employment, except accident caused by or resulting in any degree from willful negligence or intoxication.

Industries covered.—All industries where one or more persons are employed by the employer in the regular trade, business, or occupation of the employer, except domestic service, agriculture, and interstate or foreign commerce, in the absence of contrary election. Exempt employers may make an affirmative election.

Persons compensated.—Private employment: All employees, including aliens and minors, but excluding employees whose work is not for the purpose of gain or profit of the employer or casual and not in the usual course of the employer's business, and home workers. Public employment: All persons employed by the State, or any Government agency created by it, not elected or appointed for a regular term.

Burden of payment.—The entire cost rests upon the employer.

Compensation for death:

(*a*) In addition to any other benefits, a reasonable amount not exceeding $150 to cover expenses of last sickness and burial.

(*b*) To persons wholly dependent, 66 2/3 per cent of the employee's wages, but not less than $6 nor more than $15 per week, during dependency, but not exceeding 350 weeks; if the wages of the deceased were less than $6 per week then full wages are to be paid as compensation.

(*c*) If only partial dependents survive, a proportion of the above corresponding to the relation the contribution of the deceased to their support bore to his wages.

Compensation to children ceases when they reach the age of 18 years, unless they are physically or mentally incapacitated from earning.

Compensation for disability:

(*a*) Medical and hospital services subject to approval by commissioner.

(*b*) For total disability, 66 2/3 per cent of the weekly wages, but not more than $15 nor less than $6 per week for 300 weeks; thereafter, for life or while disability lasts 45 per cent of such wages, but not more than $12 nor less than $4.50 per week unless wages are less, then full wages.

(*c*) For partial disability, 66 2/3 per cent of loss of earning capacity, but not exceeding $15 per week nor exceeding 300 weeks.

(*d*) For certain specified injuries (mutilations, etc.), 66 2/3 per cent of wages for fixed periods in addition to other benefits, $15 maximum, $6 minimum, unless wages are less, then wages.

Payments begin with the eighth day, but if disability continues six weeks or longer, compensation is computed from the date of injury.

Lump sums may be substituted for periodic payments, but if for death or permanent disability, the approval of the court must be obtained.

Revision of benefits.—Benefits running for a period of six months or longer may be revised at any time by agreement of the parties, with the approval of the compensation commissioner.

Insurance.—An employer under the act must insure his liability for compensation in an authorized stock or mutual insurance company, or furnish proof of financial ability to make payments, governmental agencies excepted.

Security of payments.—Insurance policies must inure directly to the benefit of beneficiaries and be enforceable in an action by them.

Compensation rights and awards have the same preference against the assets of the employer as unpaid wages for labor.

Settlement of disputes.—All disputed claims must be submitted to the compensation commissioner, or his assistants, from whose award either party may appeal to the district court of the county, the case to be heard and determined as a cause in equity, with the right of further appeal to the supreme court.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Written notice, stating prescribed particulars, must be served upon employer or his agent as soon as practicable after injury. Defect in notice does not bar compensation unless employer or insurer was misled thereby. Knowledge excuses notice. Claim must be made within six months after injury or death (3674 §124). Claim barred unless agreement reached or proceedings begun within 1 year after.

NEVADA.

Date of enactment.—March 15, 1913; in effect July 1, 1913; amended, chapter 190, acts of 1915; chapter 233, acts of 1917; chapter 176, acts of 1919; Amended 1921, §§ 7½, 25B, 25C-2w, effective March 22, 1921.

Injuries compensated.—Injuries arising out of and in the course of employment, causing incapacity to earn full wages for more than seven days or death, except when caused by the employee's willful intent or intoxication.

Industries covered.—All except domestic and farm labor, provided the employer elects; compulsory as to the State and its municipalities.

Persons compensated.—Private employment: All employees in the industries covered, including aliens and minors, whether lawfully or unlawfully employed, but excluding employees whose work is both casual and not in the usual course of the employer's business. Public employment: All employees including volunteer firemen.

Burden of payment.—The entire cost rests on the employer, except that he may deduct one-half the cost of an "accident benefit fund," not more than $1 per month, from each employee's wages for medical, etc., expenses.

Compensation for death:

(*a*) Burial expenses not to exceed $125.

(*b*) To widow or dependent widower, 30 per cent of the average monthly wages, with 10 per cent additional for each child under 18 years of age. If only children survive, 15 per cent for each child; the total in either case not to exceed 66 2/3 per cent. If there are none of the foregoing, one dependent parent may receive 25 per cent, and two 35 per cent; if dependent brothers or sisters under 18, 20 per cent for one, and 30 per cent if more than one. Other cases of dependency are to be dealt with according to the facts.

Payments to a widow or dependent widower cease on remarriage; widow receives two years' benefits in a lump sum. Payments to children cease at 18, unless incapable of self-support.

Payments to nonresident alien beneficiaries are 60 per cent of the above.

No excess of wages above $120 per month shall be considered in awarding benefits. Volunteer fireman's wage considered to be $150 per month.

No lump-sum settlements are allowed in case the widow, dependent children, or other persons are wholly dependent.

Compensation for disability:

(*a*) Reasonable medical, surgical, and hospital aid for not more than 90 days, but may be extended to 1 year by the industrial commission.

(*b*) For temporary total disability, an amount equal to 60 per cent of the average monthly wages, but not less than $30 nor more than $72 for not over 100 months, with $10 per month additional if injured person had dependents, total amount not to exceed $7,200.

(*c*) For permanent total disability, 60 per cent of the average monthly wage, not less than $30 nor more than $60, payable during life, with $30 per month additional where a constant attendant is needed.

(*d*) For temporary partial disability, 60 per cent of the loss of earning capacity, but not more than $40 per month for not more than 60 months, wages in excess of $120 per month not to be considered.

(*e*) For certain specific injuries (mutilations, etc.), a monthly payment equal to one-half the monthly wages, not less than $30 nor more than $60, for fixed periods, in addition to the payments for temporary total disability.

No compensation is payable for the first week of disability, but if it continues one week beyond the first seven days or longer compensation is paid from the date of the injury.

The industrial commission may permit the substitution of lump sums for monthly payments in an amount not exceeding $5,000.

Revision of benefits.—Readjustments of compensation may be made by the commission on application therefor.

Insurance.—Employers coming under this act must insure in the State insurance fund.

Security of payments.—State management of the insurance fund and collection of premiums by the State. Payments are not assignable and are exempt from attachment, etc.

Settlement of disputes.—All matters relating to the amount of compensation to be paid are determined by the industrial commission.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Written notice, giving prescribed particulars, must be given to the Commission as soon as practicable, but within thirty days after the accident, or, in case of death, within sixty days thereafter. Failure to give notice bars compensation unless excused on one or more of specified grounds. Claim must be filed within ninety days after accident or one year after death (§34½; *contra,* §34d). Injury must be reported to employer immediately after the accident, unless failure to report is excused by the Commission (§33c-d).

NEW HAMPSHIRE.

Date of enactment.—April 15, 1911; in effect January 1, 1912, ch. 163; amended ch. 170-L. 1915; amended ch. 44 and 179-L. 1921.

Injuries compensated.—Any injury to an employee arising out of and in the course of employment causing disability of over two weeks, or death, unless due to willful misconduct, intoxication, or violation of law.

Industries covered.—Industries dangerous to life or limb (enumerated list), including the operation and maintenance of steam and electric railroads, work in shops, mills, factories, etc., employing five or more persons; work about lines or cables charged with electricity; operations dangerously near explosives used in the industry, or to a steam boiler owner and operated by the employer; and work in or about any quarry, mine, or foundry (enumerated list); provided the employer elects.

Persons compensated.—Private employment: All workmen engaged in any of the employments covered by this law. Public employment: Government employees are not mentioned.

Burden of payment.—Entire cost rests upon the employer.

Compensation for death:

(*a*) To persons wholly dependent, a sum equal to 150 times the average weekly earnings of the deceased, not to exceed $3,000.

(*b*) If only partial dependents survive, such proportion of the above compensation as corresponds to the portion of wages contributed to their support.

(*c*) If no dependents are left, expenses of medical care and burial to a reasonable amount, not in excess of $100.

Compensation for disability:

(*a*) For total disability, a sum beginning with the fifteenth day, not exceeding 50 per cent of average weekly earnings.

(*b*) For partial disability, a sum not in excess of 50 per cent of the loss of earning capacity.

In no case is compensation to exceed $10 a week nor run for a longer period than 300 weeks.

The court may determine the amount of lump sums payable as a substitute for weekly payments.

Revision of benefits.—The injured person, when requested by the employer, must submit to medical examination not oftener than once a week.

Insurance.—No provision.

Security of payments. The employer must satisfy the commissioner of labor of his ability to pay the required compensation or file a bond conditioned on the discharge of all liability incurred under the act.

Weekly payments have the same preferential claims against the assets of the employer as is allowed for unpaid wages or personal services.

Settlement of disputes.—All questions not settled by agreement are determined by an action in equity.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Notice stating prescribed particulars must be served on employer or his representative as soon as practicable after injury and before leaving employment. Want of notice, or defect therein, is no bar to compensation unless employer is prejudiced thereby. Claim must be made within six months after injury, death, removal of incapacity or last payment, if any (§5).

NEW JERSEY.

Date of enactment.—April 4, 1911; in effect July 1, 1911; amended by chapter 174, acts of 1913; chapter 244, acts of 1914; chapter 149, acts of 1918; and chapter 93, acts of 1919; amended 1921 §§ 23i, 20, 12l, ch. 149L, 1918, §§ 6, 11, 19, 23, ch. 178L, 1917 Art. I §§ 2, 5, effective July 1 and 4, 1921.

Injuries compensated.—Injury by accident arising out of and in the course of employment causing disability of over 10 days, or death, unless intentionally self-inflicted or due to intoxication.

Industries covered.—All employments in the absence of contrary election.

Persons compensated.—Private employment: All employees except casual. Nonresident aliens receive no benefits. Public employment: Every employee of the State, municipality, etc., except persons receiving a salary greater than $1,200 per year, and those holding an elective office.

Burden of payment.—The entire cost rests upon the employer.

Compensation for death:

(*a*) The expense of the last sickness not exceeding $200, and not exceeding $100 for burial.

(*b*) To one dependent, 35 per cent of the wages of the deceased person, and for each additional dependent 5 per cent additional, the total not to exceed 60 per cent, payable for not more than 300 weeks. Compensation not to be less than $6 nor more than $12 per week, unless the earnings were less than $6 when full wages are paid.

(*c*) If no dependents, chapter, 203, acts of 1918, requires the sum of $400 to be paid to the commissioner of labor.

No compensation is allowed to nonresident alien dependents.

Payments to all dependents cease at death, to widows on remarriage, and to orphans on reaching the age of 18, unless physically or mentally deficient.

A lump-sum payment may be substituted at the discretion of the court of common pleas.

Compensation for disability:

(*a*) Reasonable medical and hospital services for 27 consecutive days following the day of the accident, not exceeding $50 in value, which may be extended to 17 weeks and $200 in value in exceptional cases.

(*b*) For temporary disability 66 2/3 per cent of wages, payable during disability, but not beyond 300 weeks.

(*c*) For permanent total disability, 66 2/3 per cent of wages during such disability, not beyond 400 weeks.

(*d*) For certain specific injuries (mutilations, etc.) producing partial but permanent disabilities, 66 2/3 per cent of wages during fixed periods, in addition to payments for any period of total disability.

All weekly payments are subject to a minimum of $6 per week and a maximum of $12 per week unless earnings were less than $6 when full wages are paid.

A lump-sum payment may be substituted at the discretion of the workmen's compensation bureau.

Revision of benefits.—At any time after one year from the time an award becomes operative, either party may demand a revision of benefits.

Insurance.—No provision in the principal act. Supplemental acts (ch. 178 and ch. 262, acts of 1917) require every employer, whether accepting the compensation act or not to furnish proof of ability to carry his own insurance, or to be insured in an authorized company; the insurance provisions do not apply to farm laborers or domestic service.

Security of payments.—Insurance policies must be for the benefit of the employees, and be directly available on suits by them for their enforcement. The right of compensation has the same preference against the assets of the employer as is now or may hereafter be allowed by law for a claim for unpaid wages.

Settlements of disputes.—A workmen's compensation bureau created by chapter 149, acts of 1918, is charged with the duty of hearing and determining disputes, subject to an appeal to the courts.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Notice, substantially in prescribed form, must be served upon employer, etc., within 14 days after injury. Notice within 30 or 90 days variously excused. Knowledge excuses notice. No knowledge or notice within 90 days bars claim (¶¶13, 15, 16). Claim is barred unless petition is filed with the Bureau within a year after accident or death, or, where agreement for compensation has been made, within a year after which default or last payment (¶23h; Chapter 149, Laws of 1918, Sec. 5). *Henrickson v. Pub. Service Ry.*, 94 *Atl.* 402; *Allen v. City of Millville*, 95 *Atl.* 130; *Birmingham v. Lehigh & Wilkesbarre Coal Co., id.* 242; *Baur v. Court of Common Pleas, Essex County, id.* 627; *Troth v. Millville Bottle Works*, 98 *Atl.* 435; *E. I. Du Pont De Nemours Powder Co. v. Spocidio*, 101 *Atl.* 407; *Benjamin & Johnes v. Brabban*, 103 *Atl.* 688.

NEW MEXICO.

Date of enactment.—March 13, 1917; in effect June 8, 1917; amended, chapter 44, acts of 1919; chapter 184 Laws of 1921; amended §§ 17 and 18

Injuries compensated.—Injury by accident arising out of and in course of employment, causing disability for more than 10 days, or death within one year, not due to the intoxication of the injured man or willfully suffered by him or intentionally inflicted by himself or another. Failure to observe statutory safety regulations or to use safety devices will cause the compensation to be reduced 50 per cent.

Industries covered.—Extrahazardous occupations (enumerated list) in which four or more persons are employed, unless contrary election is made. If the injury is received while at work on a derrick, scaffold, etc., 10 or more feet above ground, the act applies without regard to the number of employees. Other occupations may be included by joint written agreement.

Persons compensated.—Private employment: All employees in the industries covered, except those purely casual and not for the purpose of the employer's trade or business. Public employment: Not mentioned.

Burden of payment.—All on employer.

Compensation for death:

(*a*) $75 for funeral expenses if death occurs as a proximate result.

(*b*) 40 per cent of earnings to dependent widow or widower alone, with 5 per cent additional for each child; 25 per cent to one or two orphans, 10 per cent additional for each additional child, totals in either case not to exceed 60 per cent. If no spouse or child survives, a parent or parents in any degree dependent receives 20 per cent; if none of the foregoing survive and there are brothers or sisters in any degree dependent, 15 per cent shall be paid for one, and 5 per cent for each additional one, the total not to exceed 25 per cent.

(*c*) No payment shall extend beyond 300 weeks, nor shall amounts paid partial dependents exceed the actual contributions made by the deceased to their support. Payments cease on the remarriage of a widow or widower, on a child, brother, or sister attaining the age of 18, unless mentally or physically incapacitated for earning, on the death of any dependent, the adoption of an infant, or his becoming self-supporting before reaching 18 years of age.

The earnings upon which death benefits are computed shall be taken as not above $30 per week, nor less than $12 per week except where the earnings are less than $12 per week, then the amount of the earnings.

Compensation for disability:

(*a*) Medical, surgical, and hospital services for the first 10 days, not over $150 in value, unless an adequate scheme of hospital service has been provided for, in which case such scheme shall be followed out.

(*b*) For total disability, 50 per cent of the workman's earnings, for a term not to exceed 520 weeks.

Weekly benefits shall be not more than $12 nor less than $6 per week, unless the earnings are less than $6, when the full amount shall be paid.

(*c*). For permanent partial disability, 50 per cent of earnings for specified injuries, for various periods ranging from 3 to 150 weeks, in addition to payments for any period of total disability; other cases to be compensated proportionately; disfigurement of head or face, not over $500.

Weekly benefits shall be not more than $12 nor less than $6 per week, unless the earnings are less than $6, when the full amount shall be paid.

Lump-sum settlements may be approved for part or all the benefits, for either disability or death.

Revision of benefits.—The employer may at any time require a medical examination of a beneficiary, and the court may adjust awards accordingly.

Insurance.—Employers under the act must file with the district court of the county insurance or security for the payment of benefits provided by this act, unless a certificate of financial ability is obtained.

Security of payments.—Policies of insurance must inure directly to the benefit of claimants. Benefits are exempt from attachment, garnishment, or execution, and can not be assigned.

Settlement of disputes.—Act is administered by courts. Proceedings are to be summary as far as possible. Appeals lie to the supreme court.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Written notice must be given to employer within two weeks after injury, or, if unavoidably delayed, not later than sixty days after injury. Employer's knowledge of injury excuses notice. In disability cases claim must be filed in court within 60 days after employer's failure or refusal to make payment due after notice (§13). If injury results in death, claim must be filed within a year (§16).

NEW YORK.

[Compulsory Law.]

Date, of enactment.—December 16, 1913; in effect July 1, 1914; amended, chapters 41, 316; acts of 1914; chapters 167, 168, 615, 674, acts of 1915; chapter 622, acts of 1916; chapter 705, acts of 1917; chapters 249, 633, 634, 635, acts of 1918; chapters 458, 498, 629, acts of 1919; chapters 242, 539, and 602, Laws of 1920; amended 1921, §§ 25, 26, 77, 91, 93, 186, articles 2, 3 and 17, ch. 50L, 1921, effective March 9, May 3, July 1, 1921.

Injuries compensated.—Accidental injuries arising out of and in course of employment, and disease or infection naturally and unavoidably resulting therefrom, causing disability for more than two weeks, or death, unless caused by the willful intention of the injured employee to bring about the injury or death of himself or another, or by his intoxication while on duty, and occupational diseases.

Industries covered.—"Hazardous employments," including extensive classified list; also all other employments not so enumerated, in which four or more workmen or operatives are regularly employed, domestic and farm labor excepted.

Persons compensated.—Private employment: All employees in industries covered. Public employment: Included.

Burden of payment.—Entire cost rests on employer.

Compensation for death:

(*a*) $100 for funeral expenses.

(*b*) To a widow or dependent widower alone, 30 per cent of wages of deceased, 10 per cent additional for each child under 18; dependent orphans under 18 receive 15 per cent each, and dependent parents, brothers, or sisters receive 15 per cent each; aggregate payments in no case to exceed 66 2/3 per cent.

(*c*) Payments to widow or widower cease on death or remarriage or when dependence of widower ceases, with two years' compensation on remarriage; payments to children, brothers, and sisters cease at 18 and to parents when dependence ceases.

In computing the above benefits no wages in excess of $125 monthly are considered.

Compensation for disability:

(*a*) Medical and surgical treatment and hospital services for 60 days, or longer where the conditions require, costs to be approved by the Board.

(*b*) For total disability, 66 2/3 per cent of wages during continuance.

(*c*) For partial disability, 66 2/3 per cent of wage loss; for specified permanent partial disabilities (mutilations, etc.), 66 2/3 per cent of wages for fixed periods, in lieu of other payments; separate provision for disfigurements.

The foregoing payments may not be less than $8, nor more than $20 per week or full wages if less than $8, except for certain maimings the maximum may be $20.

Payments begin on the fifteenth day, but if the disability continues for more than 49 days, compensation is allowed from the beginning.

Special rehabilitation fund from which employee may draw minimum of $10 per week.

Revision of benefits.—Awards may be reviewed at any time, and ended or increased or decreased within the limits fixed.

Insurance.—Employer must give proof of financial ability to make payments (deposit of securities may be required), or must insure in State fund or mutual or stock company.

Security of payments.—Insurance may be made to inure directly to the benefit of claimants; insolvency of employer does not release insurance company. Payments have same preference as unpaid wages for labor without limit as to amount.

Settlement of disputes.—Disputes are settled by the State Board with limited appeal to courts.

NOTICE OF INJURY AND CLAIM OR PROCEEDINGS FOR COMPENSATION.

Written notice containing prescribed particulars must be served on employer and Commission within 30 days after accident and also within 30 days after death. Failure to do so bars claim, unless excused by the Board upon one of grounds specified (§18). Claim must be made within 1 year after accident or death (§28). But the right to such notice or claim is waived unless objection is made upon hearing before the Board (§§18, 28). Advance payment waives requirement of claim (§20a). *Marinaccio v. Flinn-O'Rourke Co.*, 158 *N. Y. S.* 715; *Prokopiak v. Buffalo Gas Co.*, 162 *N. Y. S.* 288; *Sicardi v. Sarnoff Hat Co., id.* 337; *Bloomfield v. November*, 114 *N. E.* 805, 219 *N. Y.* 374, *reversing* 156 *N. Y. S.* 1116; *In re Dorob*, 167 *N. Y. S.* 415; *Bloomfield v. November, id.* 975; *In re Gibbons*, 168 *N. Y. S.* 412; *Degaglio v. Bradley Contracting Co.*, 171 *N. Y. S.* 679; *Andrews v. Butler Mfg. Co.*, 172 *N. Y. S.* 405; *Colon v. American Linoleum Co., id.* 475; *O'Esau v. E. W. Bliss Co.*, 174 *N. Y. S.* 739; *Bloomfield v. November*, 119 *N. E.* 705, 223 *N. Y.* 265, *affirming* 167 *N. Y. S.* 975; *Hynes v. Pullman Co.*, 119 *N. E.* 706, 223 *N. Y.* 342, *reversing* 166 *N. Y. S.* 1099; *Twonko v. Rome Brass & Copper Co.*, 120 *N. E.* 638, 224 *N. Y.* 263, *reversing* 170 *N. Y. S.* 682; *Folts v. Robertson*, 177 *N. Y. S.* 34; *O'Esau v. E. W. Bliss Co.*, 177 *N. Y. S.* 203; *Combes v. Geibel*, 123 *N. E.* 452, *reversing* 173 *N. Y. S.* 903; *Gibbons v. Continental Iron Works*, 179 *N. Y. S.* 608; *Wright v. Brooklyn Union Gas Co.*, 180 *N. Y. S.* 715.

NORTH DAKOTA.

Date of enactment.—Approved March 5, 1919; effective July 1, 1919, ch. 162; amended by charter 73, special session of 1919; amended 1921, §§ 2, 3-1, 4, 5, and 8, effective July 1, 1921.

Injuries compensated.—Injuries arising in the course of the employment causing disability for more than seven days or death within 6 years, not caused by employee's willful intention to injure himself or to injure another.

Industries covered.—"Hazardous employments," including any employment in which one or more employees are regularly employed in the same busi-

ness or establishment, except agricultural or domestic service and common carriers by steam railroad. Employments not classed as hazardous may elect to come under act.

Persons compensated.—Private employment: All persons engaged in hazardous occupations, including minors, apprentices, and aliens, but excluding casual employees whose work is both casual and not in the course of the employer's business and executive officers receiving more than $2400. Public employment: All employees of the State or any political subdivision thereof.

Burden of payment.—All on employer.

Compensation for death:

(*a*) Burial expenses not to exceed $150.

(*b*) To widow or wholly dependent widower without children, 35 per cent of the average weekly wages until death or remarriage; 10 per cent additional for each child under the age of 18, but not to exceed 66 2/3 per cent of the average weekly wages. Upon remarriage of widow she shall receive 156 weeks' compensation in a lump sum.

To orphans under 18, 25 per cent for one and 10 per cent for each additional not to exceed 66 2/3 per cent of the average weekly wages. Payments cease at 18 unless incapable of self-support.

To one dependent parent, 25 per cent, and to two, 20 per cent each when there is no widow, dependent widower, or child; if there are, then such amount as may remain after the widow, widower, or child are provided for, the total not to exceed 66 2/3 per cent of the average weekly wages, to continue until death.

To wholly dependent sister, brother, grandparent or grandchild, if no widow, widower, or child survives, if one, 20 per cent, if two, 30 per cent to be equally divided, to continue for eight years or until death, marriage, or termination of dependency.

(*c*) To partly dependent parents, brothers, sisters, grandparents, or grandchildren such percentages as may be allowed by board.

Payments are to be computed on the basis of a minimum wage of $18 and a maximum of $30 per week.

Compensation for disability:

(*a*) Such medical, etc., service and supplies as the injury may require.

(*b*) For total disability, 66 2/3 per cent of the average weekly wages during disability.

(*c*) For temporary partial disability, 66 2/3 per cent of the loss of earning capacity.

(*d*) For permanent partial disability, 66 2/3 per cent of weekly wages for fixed periods determined by percentages of total disability.

Compensation is paid from date of the injury if disability continues beyond seven days.

The maximum weekly compensation is $20 per week, and the minimum $6.

Lump-sum payments may be made instead of weekly payments when bureau thinks it to be to the best interest of the beneficiary.

Revision of benefits.—Bureau may review at any time, on its own motion or on application.

Insurance.—Insurance in the State fund is required of all employers in hazardous work.

Security of payments.—Fund is administered by workmen's compensation bureau. Agreements to waive rights to compensation are invalid, and all assignments of compensation are void. Compensation is exempt from claims of creditors.

Settlements of disputes.—All disputes are settled by the workmen's compensation bureau, with limited appeal to the district courts.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

No provision as to notice. Claim must be filed within 60 days after injury or death. For reasonable cause shown, Bureau may allow claim to be made within a year (§15).

OHIO.

Date of enactment.—June 15, 1911; in effect January 1, 1912; amended pages 72, 396, acts of 1913; 193, acts of 1914; 508, acts of 1915; 6, 157, 450, 528, acts of 1917; 277, 313, 555, acts of 1919; acts of 1920; amended 1921 §§ 1465, 46, 53a, 55a, 56, 68a, 68b, 68c, 69, 69a, 72b, 80, 81, 82, 90, 91, 99a; 103; effective April 26, June 20, August 4, August 15, and September 6, 1921.

Injuries compensated.—All injuries, not self-inflicted, received in the course of employment, causing disability beyond one week, or death, including also fifteen specified occupational diseases.

Industries covered.—All industries employing five or more persons regularly in the same business; also establishments with less than five workmen, if the employer elects to pay the premiums provided by this act.

Persons compensated.—Private employment: All employees excluding persons whose employment is but casual and not in usual course of trade or business of employer but including aliens and minors. Public employment: Persons in the service of the State, or its political subdivisions, excepting the officials of the State or municipal governments, and policemen and firemen in cities where pension funds are established and maintained by municipal authority.

Burden of payment.—Entire cost rests upon the employer.

Compensation for death:

(*a*) Burial expenses not to exceed $150.

(*b*) To persons wholly dependent, 66 2/3 per cent of the average weekly earnings of the deceased workman, not to exceed $15 weekly, for eight years after the date of the injury, not less than $2,000 nor more than $5,000.

(*c*) If only partial dependents survive, a proportionate sum, not to exceed $15 weekly, to continue for all or such portion of the period of

eight years as the industrial commission may determine in each case, not exceeding a maximum of $5,000.

(*d*) If no dependents, medical and hospital services not exceeding $200 in value and burial expenses as above.

Dependence of children not presumed after 16 unless physically or mentally incapacitated.

Compensation for disability:

(*a*) Medical, hospital, etc., services, not to exceed $200, but more may be allowed in cases of actual necessity.

(*b*) For temporary total disability, a weekly payment of 66 2/3 per cent of average weekly wages, during disability, not less than $5 nor more than $15 per week, but not for longer than six years, nor exceeding $3,750.

(*c*) For permanent total disability, a weekly payment as above, continuing until death.

(*d*) For partial disability, 66 2/3 per cent of loss of earning capacity, during the continuance thereof, but not exceeding $12 per week, or a total of $3,750.

(*e*) In certain specified injuries (mutilations, etc.), compensation of 66 2/3 per cent of wages, for fixed periods, with the same maximum and minimum limitations as noted above.

Payments under (*d*) and (*e*) are in addition to payments during temporary total disability.

In all cases, if wages are less than prescribed minimum, then total wages are paid as compensation; an expected increase in wages may be given consideration.

Revision of benefits.—The industrial commission may from time to time make such modification or change in its former findings of fact as it deems necessary.

Insurance.—The law creates a State insurance fund, under control of an industrial commission, in which employers under the act must insure, or give proof of ability to provide benefits equal to those provided by the State insurance fund. Noninsuring employers may be required to give security or bond to guarantee the payment of benefits falling due.

Security of payments.—Insurance is under State control. Claims for compensation under this law have the same preference against the assets of the employer as is or may be allowed by law on judgments rendered for claims for taxes.

Settlement of disputes.—The commission hears and determines all cases within its jurisdiction, limited right of appeal to the civil courts being reserved to the claimant.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

No provision as to notice. Application for compensation must be made within two years after injury or death (§1465-72a). In case of occupational

disease claim must be filed within two months after disability begins. (§ 1465-72b.)

OKLAHOMA.

Date of enactment.—March 22, 1915; in effect September 1, 1915. Amended, chapter 14, acts of 1919.

Injuries compensated.—Personal injuries causing disability for more than seven days arising out of and in course of employment, not due to the willful intention of the injured employee to injure himself or another, intoxication, or willful failure to use statutory safeguard. If disability continues for 21 days compensation is paid from date of injury. Fatal injuries not covered.

Industries covered.—"Hazardous" (enumerated list and general clause), in which more than two persons are employed, including work by State or municipalities; agriculture, horticulture, stock raising, retail stores, and interstate railways not included.

Persons compensated.—Private employment: Persons engaged in manual or mechanical work or labor in industries covered. Public employment: Workmen employed for wages in any hazardous work within meaning of this act.

Burden of payment.—All on employer. Schemes requiring contribution from employees may be approved by commission if they provide greater benefits.

Compensation for death.—Fatal injuries not covered.

Compensation for disability:

(*a*) Necessary medical, surgical, or other treatment for first 60 days not to exceed $100 in value unless in the judgment of the commission a greater period or amount is required.

(*b*) For temporary total disability, 50 per cent of average weekly wages for not more than 300 weeks.

(*c*) For permanent total disability, 50 per cent of average weekly wages for not more than 500 weeks.

(*d*) For partial disability, 50 per cent of wage loss for not more than 300 weeks; for specified permanent injuries, 50 per cent of weekly wages for fixed periods in lieu of other compensation.

Payments may not exceed $18 per week nor be less than $8 unless wages were less than $8, when full wages will be paid. Periodical payments may be commuted to lump sums, and aliens who are nonresidents may have payments commuted to lump sums equal to one-half the value of the present worth.

Revision of benefits.—Awards may be reviewed at any time on application of any party in interest.

Insurance.—Employer must insure with a stock or mutual company or association of the State or companies out of the State issuing approved policies, or maintain a benefit fund, or provide satisfactory proof of ability to make compensation payments.

Security of payments.—Insurance companies or fund systems must be approved by the commission. Claims can not be assigned, and payments are exempt from levy, execution, etc. Deposits with the commission to secure payments may be required of employers or insurers.

Settlement of disputes—Disputes are to be settled by the industrial commission, subject to appeal to the supreme court.

NOTICE OF INJURY AND CLAIM OR PROCEEDINGS FOR COMPENSATION.

Written notice, giving prescribed particulars, must be served on employer and Commission within 30 days after injury. Failure to do so bars claim, unless excused by Commission. Claim must be made within one year after injury (Art. II, §§8, 17).

OREGON.

Date of enactment.—February 25, 1913; in effect June 30, 1914. [Deferred by referendum.] Amended, chapters 271, 334, acts of 1915; chapter 288, acts of 1917; chapters 55, 288, 397, acts of 1919; acts of 1920; amended 1921, §§ 6614, 6622, 6624, 6625, 6626, 6626a, 6626b-d, 6627, 6628, 6629, 6634, 6637, 6655. Effective January 24, May 25 and July 1, 1921.

Injuries compensated.—Injuries or death by accident arising out of and in the course of employment, except those brought about intentionally.

Industries covered.—All hazardous occupations, including factories, mills, and workshops employing machinery, etc. (enumerated list); all in absence of contrary election. Other employers may accept the law by affirmative election.

Persons compensated.—Private employment: Any workman employed in enumerated hazardous employments in absence of contrary election, except farm laborers, who may be brought under the law by election. Nonresident alien beneficiaries other than parent, spouse, or child are not included unless otherwise provided by treaty. Public employment: State and municipalities, irrigation districts, etc., may elect to come under the act, also common carriers engaged in hazardous occupation other than the maintenance and operation of a railroad.

Burden of payment.—The employer deducts 1 cent from employee's daily pay roll, fixed according to industry. The State gives a subsidy.
earnings, and himself contributes this sum and a percentage of his monthly

Compensation for death:

(*a*) Burial expenses not to exceed $100.

(*b*) To widow or invalid widower, a monthly payment of $30, and to each child under 16 (daughters 18) $8 a month.

(*c*) To orphans under 16 years of age (daughters 18), a monthly payment of $15 each; the total monthly payments not to exceed $50.

(*d*) To other dependents, there being none of the foregoing, a monthly payment to each of 50 per cent of the average support received during the preceding year, but not to exceed $30 a month in all.

(*e*) To parents of an unmarried minor, a monthly payment of $25, until such time as he would have been 21, after which time compensation shall be paid according to (*d*) above.

Payments to widow or widower continue until death or remarriage. On remarriage of widow she receives a lump sum of $300. Payments to a male child cease at 16 and to a female at 18, unless the child is an invalid.

Compensation for disability: (Increased 30 per cent for period from Dec. 1, 1919 to June 30, 1921).

(*a*) Medical, surgical, and hospital expenses not exceeding $250 in value.

(*b*) For permanent total disability, monthly payments as follows: (1) If unmarried at the time of the injury, $30; (2) if with wife or invalid husband, but no child under 16 years, $35; if the husband is not an invalid, the sum is $30; (3) if married or a widow or widower with a child or children under 16 years, $8 additional to the provision under (2) above for each child until 16 years of age.

(*c*) For temporary total disability if unmarried and not an invalid 40 per cent of wages but not more than $55 per month. If four or more children under sixteen years and invalid wife or husband, 66⅔ per cent but not more than $97 per month.

(*d*) For temporary partial disability, a proportionate amount, corresponding to loss of earning power for not exceeding two years.

(*e*) For certain specified injuries (mutilations, etc.), monthly payment of $25 per month payable for fixed periods, less the time during which any payments were made on account of total disability. A lump sum at the option of the injured person is provided in some cases.

Partial lump-sum payments to any beneficiary may be substituted at the discretion of the commission, but not to exceed $4,000.

Rehabilitation fund provided:

Revision of benefits.—The rate of compensation may be readjusted either upon the application of the beneficiary or by the State industrial accident commission upon its own initiative.

Insurance.—Insurance is effected through the State industrial accident fund, under supervision of the State industrial accident commission.

Security of payments.—Insurance under State control.

Settlement of disputes.—Any decision of the commission is subject to review by the circuit court, and appeals lie from the circuit court as in other civil cases.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Application, with certificate of physician, must be filed with Commission within three months, or, in case of death, with proof of death, relationship, etc., within one year, after injury (§27).

PENNSYLVANIA.

Date of enactment.—June 2, 1915; in effect January 1, 1916; amended, acts No. 57, 359, 395, acts of 1917; acts No. 277, 306, 310, 441, 455, acts of 1919; amended 1920; amended 1921, §§ 305, 306c, Act. No. 109 L. 1921, Act. No. 296 L. 1921, Act No. 407 L. 1921, effective April 7 and May 20, 1921.

Injuries compensated.—Personal injury by accident in the course of employment, causing disability for more than 10 days or death in 300 weeks, not intentionally self-inflicted or due to the intentional act of a third person for reasons not connected with the employment.

Industries covered.—All, unless employer makes election to the contrary. A supplemental act (No. 359, acts of 1917) requires all contracts with the State or any municipality to contain a provision that the contractor shall accept the provisions of the compensation law. (Agricutural and domestic employees are excluded by a separate act.)

Persons compensated.—Private employment: All persons rendering service to another for a valuable consideration, casual employees whose work is not in the regular course of the employer's business, and outworkers excepted. Public employment: All employees.

Burden of payment.—All on employer.

Compensation for death:

(*a*) $100 funeral expenses.

(*b*) 40 per cent of weekly wages to widow or dependent widower, 10 per cent additional for each child, total not to exceed 60 per cent; if no parent, 30 per cent if one or two children, 10 per cent additional for each child in excess of two, total not to exceed 60 per cent; if no consort or child under 16, but dependent parent, brothers, or sisters, 15 to 25 per cent of wages.

(*c*) Payments cease on death, remarriage of widow or widowers, cessation of dependence of widower, or when a child, brother, or sister attains the age of 16; not to continue beyond 300 weeks, unless for children under 16, when 15 per cent of wages will be paid for one and 10 per cent additional for each adidtional child, total not to exceed 50 per cent. Basic wages are not less than $10 nor more than $20 weekly.

Upon remarriage a widow is to receive the then value of the compensation for one-third of the unpaid period.

Compensation for disability:

(*a*) Reasonable medical and surgical expenses for first 30 days after disability begins, cost not to exceed $100; in addition, hospital treatment for 30 days at prevailing costs.

(*b*) For total disability, 60 per cent of weekly wages for 500 weeks, $6 minimum, $12 maximum, total not to exceed $5,000, if wages less than $6 full wages will be paid.

(*c*) For partial disability, 60 per cent of weekly wage loss, $12 maximum, for not over 300 weeks; fixed periods for specified injuries, in lieu of other payments, $6 minimum, $12 maximum, full wages if less than $6.

Payments may be commuted to a lump sum.

Revision of benefits.—Agreements and awards may be reviewed by the board at any time for proper cause.

Insurance.—Employers must insure in the State fund, a stock or mutual company, or give proof of financial ability.

Security of payments.—Agreements or claims may be filed with a prothonotary, who enters them as a judgment, and if approved by the board they become a lien on the property of the employer. A spearate act provides for direct payments from insurance companies to the beneficiaries, in case of the employer's failure to make payments of benefits.

Settlement of disputes.—Disputes are settled by a workmen's compensation board, with appeal to courts.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Written notice, substantially in prescribed form, must be served on employer within fourteen days after accident, unless he has knowledge thereof. Delay in giving notice excused on certain grounds, unless employer has been prejudiced thereby (§§311-313). Claim must be made within a year after injury or death or last payment, if any. (§315)

PORTO RICO.

Date of enactment.—April 13, 1916; in effect July 1, 1916; amended, act No. 9, acts of 1917. New act, February 25, 1918; in effect July 1, 1918. Acts of 1919; amended 1921 §§ 2, 3, 3A-5, 6, 8, 9, 13, 15, Act No. 61 L. 1921 § 10. Effective July 14, and Oct. 12, 1921.

Injuries compensated.—All personal injuries by accident or sickness because of employment occurring to a laborer in the course of his employment and due thereto, causing death within one year or disability, excepting injuries due to an attempt to commit crime or to injure himself, his employer, or another person; intoxication, or gross negligence, or the criminal act of a third person.

Industries covered.—All industries employing three or more persons except domestic service and agricultural work withont mechanically driven machinery.

Persons compensated.—Private employment: All employees except clerical employees in offices in commercial establishments where machinery is not used; also excepting employees whose earnings exceed $1,500 per year. Public employment: Included.

Burden of payment.—All on employer.

Compensation for death.—A compensation of two to four thousand dollars as a maximum to persons wholly dependent, the amount to be graded according to the earning capacity of the deceased, and the number of beneficiaries. Benefits may be apportioned among the dependent legal heirs by the will of the decedent if not in conflict with this act or the code.

Compensation for disability:

(*a*) Medical attendance, medicines, also hospital service when necessary, and sustenance, as the workman's relief commission may prescribe.

(*b*) For temporary disability an amount equal to one-half the weekly wages, not less than $3 nor more than $12 for not more than 104 weeks.

(*c*) For permanent total disability not less than $2,000 nor more than $4,000, in proportion to the rate of wages earned at the time of injury.

(*d*) For permanent partial disability not more than $2,500, in proportion to the rate of wages earned at the time of injury. The time and manner of payments are to be determined by the workman's relief commission.

(*e*) For total disability resulting from disease not less than $1000 nor more than $3000. Temporary disability not more than 104 weeks in proportion to rate of wages earned at time of injury minimum $3 maximum $12 a week.

Revision of benefits.—No provision.

Insurance.—All payments are made from the workman's relief trust fund established by the act, to which all employers covered by the act contribute.

Security of payment.—Fund is administered by the treasurer of the island. Rights and actions not assignable nor subject to attachment. If employer is found not to be insured the Commission may levy an attachment as for the collection of taxes on the property of the employer to secure payment of compensation.

Settlement of disputes.—Claims are passed upon by the workman's relief commission, with limited appeal to the courts.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Application for compensation must be filed with the Commission within ninety days after injury or death; but thirty days additional may be granted for good cause. No application to be barred by prescription unless applicant was notified of his right (§8). No provision as to notice of injury.

RHODE ISLAND.

Date of enactment.—April 29, 1912; in effect October 1, 1912; amended, chapter 937, acts of 1913; chapter 1268, acts of 1915; chapter 1534, acts of 1917; chapter 1795, acts of 1919, acts of 1920; amended 1921 Art. 1, § 5, Art. II, §§ 4, 5, 10, Art. III §§ 1, 2, 7, 14. Art. V § 9, 10, 11, 12, Art. VI. § 7, Art. VII. § 8, effective April 27 and Sept. 1921.

Injuries compensated.—Personal injuries by accidents arising out of and in the course of employment causing incapacity for earning full wages for a period of more than one week, or death, except where the injury resulted from the willful intention of the injured person to injure himself or another, or from intoxication.

Industries covered.—All industries except domestic service and agriculture, if the employer elects. Defenses in suits for damages are not abrogated unless more than five persons are employed.

Persons compensated.—Private employment: All employees in establishments covered by this act in absence of contrary election, employees whose work is of a casual nature and who are employed otherwise than for the purpose of the employer's business, and those earning above $3,000 a year excepted. Public employment: Employees of the State, and such classes of employees of cities and towns electing to accept the act as are designated in the act of acceptance, but not including members of regularly organized fire and police departments.

Burden of payment.—Entire cost rests upon the employer.

Compensation for death:

(*a*) To persons wholly dependent, a weekly payment equal to one-half the average weekly earnings of the deceased employee, but not less than $4 nor more than $10 per week, for a period of 300 weeks.

(*b*) If only partial dependents survive, a sum proportionate to the amount which the annual contributions bore to the annual earnings of the deceased, for not exceeding 300 weeks.

(*c*) If no dependents, the expense of the last sickness and burial of the deceased employee, not exceeding $200.

Payments to children cease on their reaching the age of 18 years unless they are physically or mentally incapacitated.

Compensation for disability:

(*a*) The necessary medical and hospital services for the first eight weeks after the injury not to exceed $200.

(*b*) For total incapacity, a weekly payment equal to one-half the wages, but not less than $7 nor more than $16 per week, during such incapacity, but not for a longer period than 500 weeks, nor more than $5,000.

(*c*) For partial incapacity, a weekly payment equal to one-half the loss of earning power, but not exceeding $10 per week, during such incapacity, and not for a longer period than 300 weeks.

(*d*) For certain specified injuries (mutilations, etc.), in addition to the above, one-half the wages, weekly payments to be not less than $4 nor more than $10 per week, for fixed periods.

Payments begin on the fifteenth day, but if the incapacity extends beyond four weeks, they revert to the date of the injury.

Lump-sum payments may be substituted by order of the superior court after compensation has been paid for six months for either death or injury.

Revision of benefits.—Amounts payable may be reviewed and modified by the superior court at any time within two years, if the time for payments has not expired.

Insurance.—Employers must insure, give proof of financial ability to make direct payments, or furnish security or bond. If employees contribute to any approved scheme or insurance plan, proportionate added benefits must be provided.

Security of payments.—Insurers are directly liable to claimants; beneficiaries have a first lien on any sum due from insurers to the employer on any policy.

Settlement of disputes.—Disputes are settled by the superior court on a petition in the nature of a petition in equity, filed by any party in interest if the Commissioner of Labor fails to approve the agreement submitted. Appeals may be carried to the supreme court by any aggrieved person.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Written notice, giving certain particulars, must be served on employer or his agent within thirty days after injury. Inaccuracy of such notice is no bar to compensation unless employer is misled thereby. Notice not necessary if employer has knowledge of injury. Claim must be filed within one year (Art. II, §§17-20; Art. VII, §§2, 7). Claim is barred unless petition or agreement is filed within two years (Art. III, §18). *Pendar v. H. & B. American Machine Co.*, 87 *Atl.* 1. *Donahoue v. Sherman's Sons Co.*, 98 *Atl.* 109; *Giannotti v. Giusti Bros.*, 102 *Atl.* 887.

SOUTH DAKOTA.

Date of enactment.—March 10, 1917; in effect June 1, 1917; amended, chapters 363, 314, acts of 1919, amended 1921 §§ 9442, 9446, 9458 (6), (8), 9459 (2), (5), (6), (8), 9465, 9471. Effective Feb. 4, June 2, 1921.

Injuries compensated.—Injuries by accident arising out of and in course of employment, causing disability for more than 10 days or death, not due to intoxication or willful misconduct.

Industries covered.—All except agriculture and domestic service, in the absence of contrary election. Exempt occupations may come in by voluntary election.

Persons compensated.—Private employment: All persons in service under a contract of hire or apprenticeship, except those whose employment is both casual and not in the usual course of the business or trade of the employer. Public employees: Employees of the State and its municipalities are included.

Burden of payment.—All on the employer, except that one-half of the fees of arbitrators may be charged to the compensation allowed in any case.

Compensation in case of death:

(*a*) To a dependent widow, child, or children, a sum equal to four times the average annual earnings of the deceased person, not less than $1,650 nor more than $3,000; if none of these, similar amounts may be paid to a dependent parent, grandparent, brother, or sister. If there are none of the foregoing, collateral dependent heirs may receive such a percentage of the same amount as the deceased workman's contributions to their support during the preceding two years are of his earnings during such period.

(*b*) If there are no dependents, the employer shall pay burial expenses in an amount not exceeding $150.

Payments are to be made in installments equal to one-half the wages, as the wages were paid, or weekly, if that is not feasible. Payments cease on the death of a beneficiary or the remarriage of a widow; but if there are dependent children, amounts otherwise due her go to the children.

Compensation for disability:

(*a*) Necessary medical, surgical, and hospital services for not more than 12 weeks nor in an amount above $150.

(*b*) For total disability, 55 per cent of the weekly earnings, not more than $15 nor less than $7.50, unless earnings are less, then full wages until four years' earnings are paid, not to exceed $3,000.

(*c*) For temporary total disability, 55 per cent of the wage loss, but not less than $7.50 and not over $15 weekly, for not longer than six years; for specified injuries payments are to be made for fixed periods, in addition to the amount paid during any period of total disability.

(*d*) For partial disability, one half the wage loss subject to the foregoing limitations as to maximum.

(*e*) For serious and permanent disfigurement of the hand, head, or foot not giving rise to other awards, an agreed or arbitrated award of not more than one year's earnings.

No payment is made for disability of not more than 10 days' duration, but if it continues for 6 weeks or more, compensation is payable from the date of the injury. Commutation to lump sums may be arranged for on a proper showing.

Revision of benefits.—Awards may be reviewed by the industrial commissioner at the request of either party, and modified according to the findings.

Insurance.—Insurance in an approved company or association is required, unless satisfactory proof of financial ability to make payments is furnished, or sufficient security is deposited with the State insurance department to guarantee payments.

Security of payments.—Insurance policies are to be valid regardless of the employer's solvency, and must provide that the workman shall have a first lien upon any amount becoming due him thereunder. Claims are unassignable, and payments are exempt from execution.

Settlement of disputes.—Arbitrators are to be chosen, one by each party, the industrial commissioner acting as chairman. If review is claimed, the commissoner may revise the decision or refer it back to the arbitration board. Appeal lies to the courts only on questions of law.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Notice of injury must be given to employer immediately or as soon thereafter as practicable, unless employer has knowledge thereof or other excusable grounds exist. Compensation is barred if notice not given within 30 days after injury or death, unless excused by Commissioner. Defect in notice no bar to compensation unless employer is prejudiced thereby. Claim must be filed within one year after injury or death (§§9455-9457); but in case partially disabled employee returns to work, claim may be filed within 18 months after such return (§9459[4]).

TENNESSEE.

Date of enactment.—April 15, 1919; effective July 1, 1919.

Injuries compensated.—Injury by accident arising out of and in course of the employment, causing disability for more than 14 days, or death, not due to employee's intoxication, willful, misconduct, or intentional self-inflicted injury, or refusal to use a safety appliance or perform a duty required by law.

Industries covered.—All employing 10 or more persons, except common carriers while engaged in interstate commerce, domestic and agricultural service, and coal mining. Those employing less than 10 persons, coal mines, and public employers may elect to come under the act.

Persons compensated.—Private employment: All employed in the industries covered excepting employees whose work is casual and not in the usual course of the employer's business. Public employment: Employees are not covered unless the employer elects to come under the act.

Burden of payment.—Entire cost rests upon the employer.

Compensation for death:

(*a*) Burial expenses not to exceed $100.

(*b*) To widow, 30 per cent; with one child, 40 per cent; two or more children, 50 per cent. One orphan child, 30 per cent; each additional orphan, 10 per cent; total not to exceed 50 per cent. Dependent widower, 20 per cent. One dependent parent, 25 per cent; two dependent parents, 35 per cent. One grand parent, sister, brother, mother, or father-in-law, 20 per cent; two or more, 25 per cent, of the average weekly wages, in the order named, until death or marriage.

(*c*) If only partial dependents survive, a proportion of the above corresponding to the relation of the contribution of the deceased to the total income of such dependents.

Payments to children cease upon their reaching the age of 18 years, unless incapable of self-support.

The maximum weekly compensation is $11 per week and the minimum $5, unless wages are less than $5, when full wages are paid, for not over 400 weeks.

Compensation for disability:

(*a*) Reasonable medical and surgical treatment for 30 days after notice of accident, not to exceed $100.

(*b*) For temporary total disability, 50 per cent of average weekly wages, for not over 300 weeks.

(*c*) For temporary partial disability, 50 per cent of wage loss for not over 100 weeks.

(*d*) For permanent partial disability, 50 per cent of wage loss for not over 300 weeks; for certain specific injuries (mutilations, etc.), producing permanent partial disabilities, 50 per cent of wages during fixed periods.

(*e*) For permanent total disability, 50 per cent of wages for not to exceed 550 weeks reduced to $5 per week after 400 weeks, with maximum total of $5,000.

Payments are to begin on the fifteenth day unless disability continues for more than six weeks, when they date from the injury.

Payments may not exceed $11 per week nor be less than $5, unless wages are less than $5, when full wages are paid, and may be commuted to a lump sum.

Revision of benefits.—Revision of payments for more than six months may be made by the court on agreement of parties; or, in case of disagreement, on application of one party.

Insurance.—Insurance is required in an authorized insurance company or association, or bond of proof of financial ability to make payments.

Security of payments.—Insurance policies must inure directly to the benefit of the beneficiaries and be enforceable in an action by them.

Settlement of disputes.—Disputes are settled by the judge or chairman of the county court, with right of appeal to the courts.

NOTICE OF INJURY AND CLAIM OR PROCEEDINGS FOR COMPENSATION.

Written notice giving prescribed particulars must be served upon employer or his agent immediately, or as soon as practicable, but not more than 30 days, after occurrence of injury, unless he has actual knowledge thereof, or other reasonable excuse exists. Defect or inaccuracy in notice no bar to compensation except to extent employer was prejudiced thereby. Claim is barred if notice not given within a year after accident (§§22-24). Proceedings must be begun within 1 year after injury or removal of incapacity; in case of claim by dependent, within 1 year after date of written notice by employer to Bureau of Workshop and Factory Inspection expressing willingness to pay compensation if due (§31).

TEXAS.

Date of enactment.—April 16, 1913; in effect September 1, 1913; amended, chapter 103, acts of 1917.

Injuries compensated.—Personal injury sustained in the course of employment causing incapacity to earn full wages for at least one week, or death, not due to the act of God, unless the employment is specially exposing, nor to the intentional act of a third person committed for personal reasons not connected with the employment nor to the injured man's willful intent to injure himself or another, nor received while intoxicated.

Industries covered.—All in which three or more persons are employed, if the employer elects, except domestic and farm labor, railways (steam or electric) operated as common carriers, and vessels in interstate and foreign commerce.

Persons compensated.—Private employment: All employees in industries included except those not in the usual course of the employer's trade or business. Public employment: No provision.

Burden of payment.—The entire cost rests upon the employer.

Compensation for death:

(*a*) To the legal beneficiaries of the deceased employee, a weekly payment equal to 60 per cent of his wages, not less than $5 nor more than $15, for a period of 360 weeks, distributed according to law governing property distribution.

(*b*) If no beneficiaries are left, the expenses of the last sickness and in addition a funeral benefit not to exceed $100.

Compensation for disability:

(*a*) Medical and hospital care for the first two weeks; hospital care for two weeks additional if necessary.

(*b*) For total incapacity, a compensation equal to 60 per cent of the average weekly wages of the injured person, but not less than $5 nor more than $15 per week, during such disability, but not exceeding a period of 401 weeks.

(*c*) For partial incapacity, a compensation equal to 60 per cent of the loss of earning power during such disability, in no case to exceed $15 per week, but not exceeding 300 weeks, or for both partial and total disability, 401 weeks.

(*d*) For certain specified injuries (mutilations, etc.), compensation equal to 60 per cent of the average weekly wages of the injured person, for fixed periods, not less than $5 nor more than $15 per week, in lieu of all other compensation.

A lump-sum payment may be substituted for weekly payments in cases of death or permanent total disability, subject to the approval of the industrial accident board.

Revision of benefits.—On its own motion or on application of an interested party the industrial accident board may at any time review an award.

Insurance.—Employers come under the law only by taking insurance, which may be effected through the Texas Employers' Insurance Association, or in any company admitted to do business in the State.

Security of payments.—Compensation is payable directly by the insurance association. Policies in other companies are subject to the provisions of the act. All benefits are nonassignable, and exempt from garnishment, attachment, etc.

Settlement of disputes.—Disputes are referable to the industrial accident board, whose decisions are subject to appeal to any court of competent jurisdiction.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Notice must be given to employer or insurer within 30 days after injury, unless latter has knowledged thereof. Claim must be filed within six months after injury, death or removal of incapacity (Pt. II, §4a).

UTAH.

Date of enactment.—March 15, 1917; in effect July 1, 1917; amended chapter 63, acts of 1919; amended 1921 §§ 3108, 3114, 3114 (3), 3121, 3123, 3125, 3127, 3132, 3133, 3140 (5, 8), 3142, 3137, 3147, 3148, 3152, 3156, 3156, 3159, 3163, 3172, 3073, 3094, effective July 1, 1921.

Injuries compensated.—Injuries by accident arising out of and in course of employment, causing disability for more than three days, or death within 3 years.

Industries covered.—Compulsorily, all except agriculture and domestic service, in which three or more persons are employed; elective as to all exceptions.

Persons compensated.—Private employment: All persons regularly employed under any contract of hire, including aliens and minors legally permitted to work, but not including persons whose employment is but casual and not in the usual course of the employer's business. Public employment: Every person in the service of the State or a municipality, including regular members of the police and fire departments of cities and towns, excepting elective officials and officials receiving more than $2,400 per year salary.

Burden of payment.—All on employer, but employees may contribute to benefit schemes for benefits additional to those provided by the act.

Compensation for death:

(*a*) Funeral expenses, not exceeding $150.

(*b*) To persons wholly dependent, 60 per cent of the average weekly earnings of the deceased employees, not to exceed $16 for not over six years, $2,000 minimum, $5,000 maximum.

(*c*) To persons partly dependent, the same amount, subject to the same limits as to maximum, for all or such part of the period of six years as the commission may in each case determine.

Payments to beneficiaries cease on their death or remarriage; and the widow to receive a lump sum equal to one third the unpaid benefits to female children on their attaining the age of 18, and to males on reaching the age of 16, unless mentally or physically incapacitated from earning.

(*d*) When there are no dependents the employer or his insurer or the state fund must pay, in addition to medical and funeral expenses, a sum equal to 20% of the amount allowed for total dependents, into the State treasury for a second-injury fund, unless the employer is insured in the State fund.

Compensation for disability:

(*a*) Such medical, nurse, and hospital services and medicines as the employer or insurer may deem proper, not over $500 in value except in extraordinary cases.

(*b*) For permanent total disability, 60 per cent of average weekly wages for five years, and 45 per cent thereafter until death, $16 maximum, $7 minimum.

(*c*) For temporary total disability, 60 per cent of weekly wages for 6 years, not to exceed $5,000; $16 maximum, $7 minimum; if wages are less than $7 then the amount of wages.

(*d*) For partial disability, 60 per cent of the weekly wage loss, not over $16 per week, for not more than six years. For specified injuries causing permanent partial disability, 60 per cent, not over $16 weekly, is to be paid for fixed periods, in addition to payment for temporary total disability; proportionate awards for disfigurement or injuries not enumerated.

Any periodical payment under special circumstances may be commuted to a lump sum by the commission.

Revision of benefits.—Revision may be made from time to time as in the opinion of the commission may be justified.

Insurance.—Employers must insure in the State fund, in a stock or mutual insurance company, or give proof of ability to meet their own compensation payments; but approved benefit schemes may be maintained.

Security of payments.—Policies in private insurance companies are binding without regard to the solvency of the employer, and are enforceable by the employee directly. Self-insurers may be required to deposit security or give a bond.

Settlement of disputes.—Disputes are settled by the State industrial commission, with limited appeal to the courts.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Notice required within 48 hours or compensation is reduced 15%. Knowledge is equivalent to notice. If no notice is given within one year claim is barred. Claim for death benefits must be filed within one year after death.

VERMONT.

Date of enactment.—April 1, 1915; in effect July 1, 1915; amended, Nos. 171, 173, 174, 175, acts of 1917; Nos. 158, 159, acts of 1919; amended 1921 §§ 5785, 5788, 5804, act number 164 acts 1921, effective Mar. 25 and June 1, 1921.

Injuries compensated.—Personal injury causing disability for more than seven days (14 days until July 1, 1918), or death within two years, arising out of and in course of employment, not due to the employee's willful intention to injure himself or another, his intoxication, or failure to use a safety appliance.

Industries covered.—All industrial establishments in which more than 10 persons are employed, and commerce as far as permissible under Federal laws, domestic labor excepted, unless election to the contrary is made. Public service under municipalities which elect compensation system.

Persons compensated.—Private employment: All under contract with or in service of an employer, domestic and casual employees, those not in the usual course of the employer's business, and those receiving more than $2,000 excepted. Public employees: All except those elected by popular vote or receiving in excess of $2,000 annually.

Burden of payment.—All on employer.

Compensation for death:

(*a*) $100 for funeral expenses if death occurs within two years.

(*b*) 33 1/3 per cent of weekly wages to dependent widow or widower, 40 per cent if there be one or two children, and 45 per cent if more than two; if no parent, 25 per cent to one or two children, 10 per cent additional for each child in excess of two, total not to exceed 40 per cent; if no consort or child under 18, and dependent parent, grandparent, or grandchild, 15 to 25 per cent of wages.

(*c*) Payments to widow cease on death or remarriage; to widower on remarriage or cessation of dependency; to children on reaching age of 18 unless incapable of self-support, in no case to exceed 260 weeks or $3,500 in amount; payments to other classes of beneficiaries end in 208 weeks at most. Basic wages are not less than $5 weekly.

Compensation for disability:

(*a*) Medical and hospital services for first 14 days, not to exceed $100.

(*b*) For total disability 50 per cent of weekly wages for not more than 260 weeks, $6.00 minimum, $15.00 maximum, total not to exceed $4,000. If wages are less than $3, full wages will be paid.

(*c*) For partial disability, 50 per cent of wage decrease, maximum $15.00, minimum $3.00 for not more than 260 weeks.

(*d*) For certain specified injuries, 50 per cent of weekly wages, but not more than $15.00 nor less than $6.00 for designated periods ranging from four to 170 weeks, following the period of total disability, the total not to exceed 260 weeks.

Payments may be commuted to one or more lump sums in any case.

Revision of benefits.—Awards may be reviewed on application at any time, but not oftener than once in six months.

Insurance.—Required unless deposit of security is made, or satisfactory proof of financial responsibility.

Security of payments.—Employees may have direct recourse to insuring company; insolvency of employer does not release insurer; compensation rights are preferred claims.

Settlement of disputes.—Disputes are determined by a commissioner of industries, with appeal to courts.

NOTICE OF INJURY AND CLAIM OR PROCEEDINGS FOR COMPENSATION.

Written notice giving certain particulars must be served on employer as soon as practicable after injury, unless employer had knowledge thereof. Inaccuracy or delay in giving notice is no bar to recovery unless employer was prejudiced thereby. Claim must be made within six months after injury or death, unless payments have been voluntarily made within that time. Where through mistake an action for damages is brought, and judgment rendered against employee, time for filing claim does not begin to run until six months after final determination of action (§§5796-5799).

VIRGINIA.

Date of enactment.—March 21, 1918; in effect January 1, 1919, ch. 400. Laws of 1920.

Injuries compensated.—Injuries caused by accident arising out of and in course of employment, not due to the injured person's willful misconduct, intoxication, intention to injure himself or another, or failure to use a safety appliance or to perform some duty required by law or to obey a rule of the employer, and causing disability for more than 10 days or death within 6 years.

Industries covered.—All employing regularly more than 10 persons, in absence of contrary election, domestic and farm labor and interstate commerce and intrastate common carriers using steam excepted.

Persons compensated.—Private employment: All employees of employers under the act who do not themselves make a contrary election, including minors and apprentices, except employees whose employment is not in the usual course of the employer's business. Public employment: All employees.

Burden of payment.—All on employer.

Compensation for death:

(*a*) Burial expenses not exceeding $100.

(*b*) To persons wholly dependent a weekly payment equal to one-half the average weekly wages of the deceased; $12 maximum, $5 minimum.

(*c*) If only partial dependents survive, such proportion of the above as the amount contributed bears to the annual earnings of the deceased employee.

(*d*) Payments may not extend beyond a period of 500 weeks, nor to children after they attain the age of 18 years, unless physically or mentally incapacitated. Payments to a widow or widower are, on remarriage, to be divided among other dependents, if any.

Compensation to alien dependents (Canada excepted) may not exceed $1,000.

The total compensation may not exceed $4,000.

Compensation for disability:

(*a*) Necessary medical attention for the first 60 days; additional services including surgical and hospital services and supplies, may be furnished at the employer's option, and must be accepted unless the industrial commission orders otherwise.

(*b*) For total disability, one-half the weekly wages, not more than $12 nor less than $5 per week, for not more than $500 weeks, the total not to exceed $4,500.

(*c*) For partial disability, one-half the wage loss, not more than $12 per week, for not more than 300 weeks; for specified injuries (loss of member or members) 50 per cent of the wages for fixed periods.

Lump sums may be substituted for periodic payments in any case after 26 weeks on agreement of the parties and the approval of the industrial commission.

Revision of benefits.—The industrial commission may review an award on its own motion before a judicial determination, or at any time on the application of a party in interest on the ground of a change in condition.

Insurance.—Every employer coming under the act must insure in a stock or mutual company, or in a State fund, or furnish satisfactory proof of financial ability to make direct payment. Also pay state treasurer 1/20 of 1 per cent per annum as a charge for services rendered.

Security of payments.—Claims are not assignable, and are exempt from claims of creditors; payments have the same preference for full amount as wage debts. Notice to the employer is notice to the insurer, and policies must inure directly to the benefit of the person entitled to compensation.

Settlement of disputes.—Disputes are settled by the industrial commission, subject to limited appeal to courts.

Loss of vision or loss of use of members is equivalent to the loss of members.

NOTICE OF INJURY AND CLAIM OR PROCEEDINGS FOR COMPENSATION.

Notice of accident must be given to employer immediately or as soon as practicable thereafter, unless employer has knowledge thereof or other excusable grounds exist. Compensation barred if notice not given within 30 days after injury or death, unless excused by Commission. Defect in notice no bar unless employer prejudiced thereby. Claim must be filed within a year after accident, and, in case of death, also within one year thereafter (§§23-25).

WASHINGTON.

Date of enactment.—March 14, 1911; in effect October 1, 1911; amended chapter 138, acts of 1913; chapter 188, acts of 1915; chapters 28, 120, acts

of 1917; chapters 67, 129, 130, 131, acts of 1919; amended 1921 §§ 6604, 2, 3, 4a, 4b, 10, 12e, 17, 24, 33, 45, 95a, 96, 98, 100, 109, Chap. 7 Laws of 21. effective June 8, 1921.

Injuries compensated.—Injuries causing disability for more than eight days, or death, except injuries brought about intentionally.

Industries covered.—All extrahazardous employment (enumerated list and covering clause), but not including railway employees engaged in interstate commerce; public utilities; State, county, and municipal undertakings involving extrahazardous work.

Persons compensated.—Private employment: All employees in industries covered by the act; including employees on the pay roll at a rate not less than the average named in such pay roll. Public employment: All employees in industries covered by the act.

Burden of payment.—The entire burden rests upon the employer, except as to the medical aid fund, to which the employee contributes one-half; or an approved relief fund may be maintained by joint action.

Compensation for death:

(*a*) Expenses of burial not to exceed $75 if unmarried, $100 if widow or child survives.

(*b*) To widow or invalid widower, a monthly payment of $30; to each child under 16, $5 per month, the total not to exceed $50 per month.

A widow receives in addition to monthly payments a lump sum of $250 where the burial expenses do not exceed the amount allowed.

(*c*) If no parent survives, a monthly payment of $10 to each child under 16 years of age, the total not to exceed $40 per month.

(*d*) To other dependents, if none of the above survive, a monthly payment to each, during dependency, equal to 50 per cent of the average amount previously contributed to the dependent, the total not to exceed $20 per month.

(*e*) To the parent or parents of an unmarried minor a monthly payment of $20 until the time he would have been 21. In case of dependence, payments to parents of minors are governed by (*d*).

Payments to a widow or widower cease on death or remarriage, and to a child on reaching the age of 16 years, or 18 years if invalid If a widow remarries, she receives a lump sum of $240.

Compensation for disability:

(*a*) Proper medical, etc., services and care during the period of disability, if temporary; if permanent, until awards are made.

(*b*) For permanent total disability: (1) If unmarried, $30 per month; (2) if wife or invalid husband, but no child, $30 a month; if husband is not an invalid, $15; (3) if married, or a widow or widower with child or children under 16 years, $5 a month additional for each child, the total not to exceed $50; if constant attendance is required, $20 per month additional. In case of death from

whatever cause, while totally disabled, death benefits accrue as above.

(*c*) For temporary total disability, payments as for permanent total disability during disability with specified rates for first six months, according to number of dependents.

(*d*) For temporary partial disability, the payment as for total disability continues in proportion to the loss of earning power, if over 5 per cent.

(*e*) For specified permanent partial disabilities, lump sums ranging from $500 to $2,000, in lieu of other payments, other disabilities to be compensated proportionately; parents of an injured minor receive in addition 10 per cent of the award of such minor.

No benefits are to be paid for the first 8 days unless the disability continues for more than 30 days.

Monthly payments may be converted into a lump-sum payment, not over $4,000, in case of death or permanent total disability.

Revision of benefits.—Revision may be had upon application of the beneficiary or upon the motion of the department.

Insurance.—Insurance is required in a State accident fund.

Security of payments.—Accident fund under State control.

Settlement of disputes.—By industrial insurance department, whose decisions are subject to review by the superior court, from which appeal lies as in other civil cases.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Injured employee or his representative must report accident forthwith to employer or foreman (§§6604-14). Application for compensation, with attendant physician's certificate, and in case of death, with proof of same, must be filed with Department within one year after injury or accrual of right. It is the duty of attending physician to advise injured employee as to his rights and to assist him in making proof of claim, without charge therefor (§6604-12).

WEST VIRGINIA.

Date of enactment.—February 22, 1913; in effect October 1, 1913; amended, February 20 and March 13, 1915; ch. 131, February 13, 1919.

Injuries compensated.—All personal injuries not the result of willful misconduct or intoxication of the injured employee, disobedience to rules of employer, failure to use a safety device, or self-inflicted, causing incapacity for more than one week, or death within one year.

Industries covered.—All except domestic or agricultural labor, including the State and all government agencies.

Persons compensated.—Private employment: All employees in industries covered, including aliens, except members of firms, traveling salesmen,

persons not legally employed, and the officers, managers, etc., of corporations. Public employment: Included, except elective officials.

Burden of payment.—Employer, 90 per cent; employees, 10 per cent.

Compensation for death:

(*a*) Reasonable funeral expenses, not to exceed $150.

(*b*) To the widow or invalid widower, $20 per month, and $5 per month additional for each child under the age of 15 years.

(*c*) To other persons wholly dependent, if no widow, invalid widower, or child under the age of 15 years is left, 50 per cent of the average monthly support received from the deceased during the preceding year, not exceeding $20 per month, for six years.

(*d*) If the deceased was a single minor, to a dependent parent, 50 per cent of the earnings, not to exceed $6 per week for 6 years unless parents were only partially dependent or deceased was under 15 year of age, then until the time when he would have become 21.

(*e*) If only partial dependents survive, a compensation computed as in (*c*), with the same maximum.

Payments to a widow or widower cease on remarriage, and to children on reaching the age of 15 years unless child is an invalid. If widow or invalid widower remarry within two years of death of employee, he or she is to be paid 20 per cent of balance of 10 years' benefits.

Compensation for disability:

(*a*) Medical, nurse, and hospital services, not exceeding $150 ($300 in special cases, which may be increased to $600 by the commissioner).

(*b*) For temporary disability, during such disability, 50 per cent of the average weekly earnings for not exceeding 52 weeks, except that for certain ununited fractures, etc., the period may be 78 weeks.

(*c*) For permanent disability, 50 per cent of wages for periods varying with degree of disability (from 5 to 85 per cent, with special schedule for maimings), periods ranging from 20 to 340 weeks; above 85 to 100 per cent disability, 50 per cent of wages for life.

Lump-sum payments may be substituted for periodic payments in case of either injury or death.

Payments for all disabilities $5 minimum, $12 maximum.

Revision of benefits.—Awards may be modified at any time.

Insurance.—Insurance is effected through a State fund under the control of the compensation commissioner, or employers of approved ability may carry own risks giving bond for performance of requirements not less than those of the law, without contributions from their employees.

Securities of payments.—Payments may be made only to beneficiaries, and are exempt from claims of creditors or attachment or execution.

Settlement of disputes.—Disputes are settled by the commissioner; limited appeal to the supreme court of appeals.

5. NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Application for compensation must be made on form or forms prescribed by commissioner (instead of "in due form," as heretofore). It is newly provided that if employer fails to report injury within six months, application for compensation filed after the expiration of six months may be accepted in the discretion of the commissioner (§39).

WISCONSIN.

Date of enactment.—May 3, 1911; in effect same date; amended, chapters 599, 707, 772, acts of 1913; 121, 241, 316, 369, 378, 462, acts of 1915; 624, 637, acts of 1917; 136, 457, 568, 577, 668, 680, 692, acts of 1919; amended 1921 §§ 2394, 7, 9m, 9 (1), 9 (2b, 5f, g), 10, 10 (1), 11, 12 (2), 16, 16 (2), 22, 24 (1, 2, 4), 27 (1), effective April 23, June 28, July 2, 7, 18, 1921.

Injuries compensated.—Personal injury by accident causing disability of at least one week, or death, while performing service growing out of and incidental to the employment, not intentionally self-inflicted; occupational diseases included.

Industries covered.—All, if the employer elects; election presumed where there are three or more employees, except as to agriculture and railroads. Compulsory as to the State and its municipalities.

Persons compensated.—Private employment: All employees except those not employed in the usual trade, business, or occupation of the employer, including aliens, in the absence of contrary election. Public employment: All employees of the State or its political subdivisions, officials excepted.

Burden of payment.—Entire cost rests upon the employer.

Compensation for death:

(*a*) The reasonable expense of burial, not exceeding $100.

(*b*) To persons wholly dependent, a sum equal to four years' earnings, but which when added to any prior compensation for permanent total disability shall not exceed six years' earnings.

(*c*) If only partial dependents survive, a sum not to exceed four times the amount provided for their support during the preceding year.

All payments are to be made in weekly installments equal to 65 per cent of the average weekly earnings. Benefits for death resulting from intoxication are reduced to 15 per cent.

Dependency of children ceases at 18, unless physically or mentally incapacitated.

Compensation for disability:

(*a*) Medical, surgical, and hospital treatment for 90 days, and for such additional time as will in the judgment of the industrial commission lessen the period of compensation; artificial members are also to be supplied. Employee may have Christian Science treatment unless employer elects to the contrary.

(*b*) For total disability, 65 per cent of the average weekly earnings during such disability.

(*c*) For partial disability such proportion of weekly rate for total disability as actual wage loss bears to average wage at time of injury.

(*d*) For certain specified injuries (mutilations, etc.), a sum equal to 65 per cent of average weekly wages for fixed periods, ranging from 6 to 320 weeks, in lieu of other payments.

(*e*) For serious permanent disfigurement, a lump sum may be allowed,

Payments begin with the eighth day, but if disability continues for more than 28 days, payment is to be made for the first 7 days.

In case of temporary or partial disability the aggregate compensation for a single injury shall not exceed four years' earnings; for permanent disability payments are limited to periods from 9 to 15 years, according to the age of the injured person. Compensation is reduced 15 per cent if injury was due to intoxication.

Lump-sum payments may be substituted at any time after six months from the date of injury.

Revision of benefits.—The commission may modify or change its order or award within 10 days if a mistake is discovered; or a review by the court may be had on appeal within 20 days.

Insurance.—Insurance in approved companies is required unless the employer gives proof of financial ability; but the liability of the employer may not be reduced by such insurance.

Security of payments.—Claims for compensation are given the same preference in bankruptcy or insolvency proceedings, as claims for labor, and are nonassignable and exempt from attachment or execution. The industrial commission may require security for payments of awards running six months or more.

Settlement of disputes.—Disputes are settled by the industrial- commission, subject to a limited review by the courts.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Written or actual notice, stating prescribed particulars, must be served on employer within 30 days after accident. Payments within 3 0days excuse notice. Failure to give notice, or defect therein, does not bar compensation unless employer is misled thereby. In absence of notice of payment within 2 years after accident, right to compensation is barred (§2394-11). *City of Milwaukee v. Ind. Commission,* 151 *N. W.* 247; *Wm. Rahr Sons Co. v. Ind. Commission,* 163 *N. W.* 169; *Pellett v. Ind. Commission,* 156 *N. W.* 956; *A Breslauer Co. v. Ind. Commission,* 167 *N. W.* 256; *Vasey v. Ind. Commission, id* 823.

WYOMING.

Date of enactment.—Chapter 124, February 27, 1915; in effect April 1, 1915; amended chapter 69, acts of 1917, chapter 117, acts of 1919; amended 1921 §§ 4318, 4325, 4330; 4334b-d, 4340, ch. 68, Laws of 1921 effective Feb. 17, 18, and April 1, 1921.

Injuries compensated.—Personal injury causing disability for more than 7 days, or death, as a result of employment and not due to the culpable negligence of the injured employee or to the willful act of a third person due to reasons personal to such employee or because of his employment.

Industries covered.—Extra hazardous (enumerated list), in which three or more workmen are employed, interstate railroads, and persons whose employment is purely casual and not for the purpose of the employer's business excepted; public employment and use of explosives and work 10 or more feet above ground included, without reference to number of employees.

Persons compensated.—Private employment: All employees in industries covered. Public employment: All employees in classes of employment designated.

Burden of payment.—All on employer.

Compensation for death:

(*a*) $100 for funeral expenses, unless other arrangements exist under agreement.

(*b*) Lump-sum payments of $2,000 to widow or invalid widower, and additional sum, equal to $120 per year, until the age of 16 is reached for each child under the age of 16, the total for children not to exceed $3,600. If there are dependent parents and no spouse and no child under 16, a sum calculated on a basis of 50 per cent of the monthly support of last three year's contributions for the period of probable support, not exceeding $1,000.

Payments to nonresident alien beneficiaries are limited to 33 1/3 per cent of the amounts above provided, and only the widow and children under 16 years of age are considered.

Compensation for disability:

(*a*) In cases of total disability and permanent partial disability, medical attention and care in a hospital, maximum $200.

(*b*) For permanent total disability, lump sum of $4,000 if single or with wife or invalid husband, and a sum equal to $120 per year for each child under 16, until the age of 16 is reached, the total for children not to exceed $7,600.

(*c*) For temporary total disability, $50 per month if single, $60 if married and $7.50 monthly for each child under 16, the total monthly payment not to exceed $90, and the aggregate not to exceed the amount payable if the disability were permanent.

(*d*) For permanent partial disability, fixed lump sums, from $225 to $1,500, for specified injuries in lieu of other payments; others in proportion.

No payments are made for the first 10 days unless disability continues for more than 30 days, when they date from the injury.

All payments are lump sums, except for temporary total disability.

Revision of benefits.—No provision.

Insurance.—Insurance in State fund required.

Security of payments.—Insurance under State control; payments not assignable or subject to execution, attachment, etc.

Settlement of disputes.—Disputes are settled by the district courts of the counties, with appeal to the supreme court of the State.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

No provision.

UNITED STATES—CIVIL EMPLOYEES.

Date of enactment.—Public No. 267, September 7, 1916; in effect same date.

Injuries compensated.—Personal injuries sustained while in the performance of duty, not due to intoxication, willful misconduct, or intention to bring about injury, causing death within 6 years, or disability for more than three days.

Industries covered.—All civilian employments of the United States Government and the Panama Railroad Co.

Persons compensated.—All civil employees of the United States and of the Panama Railroad Co.

Burden of payment.—All on the employer.

Compensation for death:

(*a*) $100 burial expenses, and transportation of body of resident of the United States dying away from home, if relatives desire it

(*b*) To widow or dependent widower alone, 35 per cent of the monthly wages of the deceased, with 10 per cent additional for each child, the total not to exceed 66 2/3 per cent.

(*c*) If no parent survives, 25 per cent to one child, and 10 per cent additional for each additional child, the total not to exceed 66 2/3 per cent.

(*d*) To dependent parents of deceased, 25 per cent if one, 40 per cent if both are dependent; if there is a widow, widower, or child, the parents' rights are subordinate, and the total awards may not exceed 66 2/3 per cent.

(*e*) Other dependent relatives receive benefits in smaller amounts subject to the claims of the foregoing relatives.

Payments to a widow or dependent widower terminate on their death or remarriage; to a child on marriage, reaching the age of 18, or if over 18 and incapable of self-support, on becoming

capable of self-support; payments to other beneficiaries are subject to the above limitations, but may in no case continue beyond eight years.

All payments are subject to a maximum of $66.67 per month, and to a minimum of $33.33.

Compensation for disability:

(*a*) Reasonable medical, surgical and hospital services and supplies.

(*b*) For total disability, 66 2/3 per cent of the monthly pay during the continuance of such disability.

(*c*) For partial disability, 66 2/3 per cent of the difference in wage-earning capacity due to such disability.

Payments are subject to the same maximum and minimum amounts as in case of death.

Payments on account of death or permanent disability may be commuted to lump sum.

Revision of benefits.—Awards may be reviewed at any time, either on request or by the commission on its own motion.

Insurance.—No provision.

Security of payments.—Compensation is paid from special compensation fund.

Settlement of disputes.—The United States Employees' Compensation Commission decides all questions arising under the act. In case of disagreement between Government's and employee's physician, the commission shall appoint a 3rd physician.

NOTICE OF INJURY AND CLAIM FOR COMPENSATION.

Unless immediate superior has knowledge of injury, notice must be given within 48 hours thereafter; but for any reasonable cause Commission may allow notice within one year. Claim for disability must be made within 60 days after injury; but for any reasonable cause Commission may allow claim within one year. Claim for death must be made within one year (§§15-20).

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